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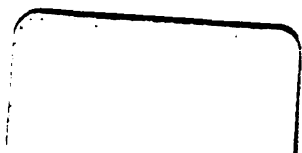
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REPORTS OF CASES

DETERMINED IN

THE DISTRICT COURTS OF APPEAL

OF THE

STATE OF CALIFORNIA

FROM AUGUST 25, 1919, TO OCTOBER 28, 1919

RANDOLPH V. WHITING
REPORTER

FRED L. STEWART
HENRY F. WRIGLEY
WILLIAM F. TRAVERSO
ASSISTANT REPORTERS

VOLUME 43

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¹ Resigned.

² Appointed September 2, 1919, in place of Thos. E. Haven, resigned.
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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Civ. No. 1981. Third Appellate District.—August 25, 1919.]

A. V. KEYES, Respondent, v. F. B. NIMS, Appellant.

- [1] **APPEAL—REVIEW OF FINDINGS BY APPELLATE COURT—EVIDENCE CONSIDERED.**—In determining whether the findings of the trial court are supported, the appellate court is required only to look to the testimony presented by the prevailing party and, if sufficient, it may disregard any adverse showing made by the other party.
- [2] **JOINT ADVENTURES—PARTNERSHIP DISTINGUISHED.**—While a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. In a partnership, each partner embraces the character of both principal and agent, being the former when he acts for himself in the partnership; while in a joint adventure, no one of the parties thereto can bind the joint adventure.
- [3] **Id.—RIGHTS OF ADVENTURERS—RULES GOVERNED BY.**—In an action to secure the dissolution of an alleged partnership between the parties and for an accounting, it is immaterial whether the relation between the parties is that of a partnership or a joint adventure, or a limited partnership. The resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships.

2. Partnership distinguished from joint adventure, note, 115 Am. St. Rep. 407.

49 Cal. App.—1

(1)

- [4] **ID.—RIGHT OF MEMBERS TO SUE AT LAW.**—One party to a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure, but the right thus to sue at law does not preclude a suit in equity for an accounting.
- [5] **ID.—ACTION FOR DISSOLUTION AND ACCOUNTING — PARTNERSHIP PLEADED—RELIEF GRANTED.**—Where, in an action by a joint adventurer for a dissolution of an alleged partnership and for an accounting, the evidence is sufficient to warrant the trial court in finding and adjudging that the plaintiff is entitled to one-third of the profits realized from the joint enterprise which was the subject of the agreement between him and the defendant and to an accounting for the purposes of determining the extent or amount of such profits, such judgment and decree will be sustained on appeal notwithstanding the complaint alleges that the relation between the parties was a partnership whereas it was a joint adventure.
- [6] **ID.—EFFECT OF CONTRACT TAKING IN NEW PARTY.**—Where two persons enter into a partnership agreement for the purpose of carrying on a certain designated business, but subsequently a third person, with the consent of the two original members, is given a one-sixth interest in the partnership by each of such members, the purpose of the partnership not being changed, the taking of such third person into such partnership does not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between the parties thereto.
- [7] **APPEAL — QUESTION NOT CONSIDERED THROUGH OVERSIGHT — REHEARING NOT NECESSARY.**—Where the appellate court, through oversight, fails to consider the question of interest allowed by the trial court, such matter may be considered and disposed of on application for a rehearing without ordering a rehearing. (On petition for rehearing.)
- [8] **JOINT ADVENTURES—ACTION FOR DISSOLUTION AND ACCOUNTING—RIGHT OF PLAINTIFF TO INTEREST.**—In an action by one party to a joint adventure for a dissolution of the relationship between the parties and for an accounting, it is not error to include in the judgment interest on the amount of money awarded to the plaintiff from the date of the sale of the subject matter of the ad-

4. Mutual rights and liabilities of parties to joint adventure, notes, 17 Ann. Cas. 1022; Ann. Cas. 1912C, 202; Ann. Cas. 1914C, 691; Ann. Cas. 1916A, 1210.

8. Settlement of accounts between joint adventurers, note, Ann. Cas. 1912C, 204.

venture by the defendant, where the only question to be determined by the court is the extent of the plaintiff's interest, that is, whether it is a one-half or a one-third interest, the facts governing which are known to the defendant. (On petition for rehearing.)

APPEAL from a judgment of the Superior Court of San Joaquin County. George F. Buck, Judge. Affirmed.

Meredith, Landis & Chester, Thos. S. Louttit, Gerald Beatty Wallace, Webster, Webster & Blewett and Louttit & Stewart for Appellant.

Lafayette J. Smallpage and Scott Rex for Respondent.

HART, J.—The action was brought to secure the dissolution of an alleged partnership between the parties and for an accounting. A trial was had before the court sitting without a jury and judgment was entered dissolving the partnership and awarding plaintiff damages, with interest and costs, amounting in the aggregate to \$6,960. The appeal is by defendant from said judgment.

Appellant contends that the evidence is insufficient to support several of the findings of the court, the first finding attacked being numbered 1, which stated that the parties hereto "formed a partnership."

The finding that the relation existing between the parties was that of a partnership was based upon a written instrument (hereinafter to be called the "Keyes-Nims contract") which is in the following language:

"Stockton, California, September 26th, 1916.

"It is hereby agreed between F. B. Nims of Stockton, California, and A. V. Keyes of Stockton, California, that all dealings and contracts entered into with the Samson Sieve-Grip Tractor Company of Stockton, California, after the 27th day of September, 1916, that each shall have an equal interest, that is, share and share alike.

"F. B. NIMS.

"A. V. KEYES."

It is argued by appellant that the above agreement did not contain the essential elements of a partnership agreement, and that the parties, at the time of the signing thereof, did not intend to become partners. It is also contended by ap-

pellant that the said Keyes-Nims contract was never acted upon so as to "launch" a partnership. The above propositions will be considered in their order.

The consideration of the points thus relied upon by appellant will be clarified by first presenting a brief statement of the facts leading up to the execution of the said instrument and of the subsequent dealings between the parties.

The plaintiff testified that he had been engaged for about ten years in the business of selling investment securities and that, in 1916, he secured a contract from the Samson Sieve-Grip Tractor Company (hereinafter called the Samson Company), under the terms of which he was to endeavor to sell one hundred and fifty thousand dollars' worth of the capital stock of the company on a ten per cent commission basis. On September 20, 1916, plaintiff presented to defendant a "form" letter of introduction from J. M. Kroyer, president of the Samson Company, and endeavored to interest defendant in the purchase of stock. Plaintiff had previously suggested to Mr. Kroyer the advisability of establishing a manufacturing plant in the middle west. In the course of the conversation with defendant, plaintiff mentioned the matter of building a factory in the middle west. Defendant said that he had just returned from Michigan and that he had a friend there who was desirous of entering into a contract for the agency of some tractor company. Plaintiff testified: "I told Mr. Nims at this time, 'Mr. Nims, I feel that I can get a contract from the Samson Company if I had some man with me who was financially responsible,' that I knew that the Samson Company would not give me a contract because I did not have the means to carry out the idea that I had, and asked him if he was . . . and he said that he was, that he would go as strong as forty thousand dollars." Plaintiff said that defendant requested him to take the matter up with the Samson people, which he did, with the result that, on September 26, 1916, the Samson Company addressed to plaintiff a letter in which it was stated that at a directors' meeting it was decided to enter into such an agreement if satisfactory arrangements could be made. The letter also made tentative proposals for the execution of a contract. Plaintiff immediately submitted this letter to defendant, its terms were discussed and defendant suggested that plaintiff write a counter-proposal, which he did. During this conversation

plaintiff said: "Mr. Nims, would you mind signing some kind of a simple agreement that in case anything happened to us, you having the contract in your name as we have discussed it, I will have something to show that I have an interest therein?" Defendant replied: "Certainly." Plaintiff prepared the Keyes-Nims contract and it was signed by defendant. The witness testified that in several conversations he had with defendant they had talked generally about how the matter should be financed. He testified: "I stated to Mr. Nims that I didn't have money enough at that time hardly to pay the expenses incurred in the sale of this stock, and that I would have to wait before I could put in any money until such time as I had sold that stock and derived the commissions therefrom." Plaintiff showed defendant a copy of his commission contract with the Samson Company and witness stated that defendant said "that he was willing to finance me until such time as I got in returns from the sale of this stock."

A contract between the Samson Company and defendant was drawn up and plaintiff said he had four or five interviews with defendant in which its terms were discussed by them. The contract was executed on October 23, 1916. By its terms defendant was given the right to erect one or more plants and to sell tractors in certain designated territory in the United States and Canada. Certain payments by defendant to the company were specified, the first being two thousand five hundred dollars to be paid upon the signing of the contract.

Plaintiff testified that, about the 15th of October, 1916, defendant said to him that he, defendant, had a friend, of the name of Mr. Clarke, whom he had taken the liberty to invite into the proposition. Two or three days later a meeting was held at the Hotel Stockton at which were present plaintiff, defendant, and C. D. Clarke. As to what then occurred plaintiff testified: "There was a general discussion regarding different methods that we should finance this company in the middle west, and Mr. Nims told Mr. Clarke, in so many words, that I would receive from the sale of the stock of the Samson Company something over ten thousand dollars; . . . I had a ten per cent contract to sell one hundred and fifty thousand dollars' worth of stock. I replied that was true, and followed that up by stating that I would

be perfectly willing, when that stock was sold and I would receive my money from it, to put in any amount that would be agreed upon by us gentlemen at a later date, five or ten thousand dollars. . . . Mr. Nims stated to Mr. Clarke that he had to take care of me until such time as I sold the stock . . . Mr. Clarke suggested that he would come in with us and put up his third and send a check in a few days. Mr. Nims said, 'Well, boys, I am going through with it anyway.' Mr. Clarke says, 'Be assured in a few days I am going to come in.' . . . During this conversation no mention was made of the contract between Mr. Nims and myself."

It further appears, and the court found, that on or about October 17, 1916, and prior to the obtaining of the royalty contract from the Samson Sieve-Grip Tractor Company, the plaintiff and defendant, by mutual consent, both offered to C. D. Clarke one-sixth of their respective interests, that said Clarke accepted said offer, and that thereupon the interests of said partnership and its assets of said Clarke, plaintiff and defendant were equal, each acquiring a one-third thereof; "that, during the month of January, 1917, defendant, without the knowledge or consent of plaintiff, agreed to return to said Clarke all moneys which he had theretofore advanced toward the aforesaid partnership business, and in return therefor the said Clarke agreed, without the knowledge or consent of plaintiff, to assign to defendant his one-third interest in and to said partnership and its assets"; that during the month of April, 1917, the said agreement between said Clarke and the defendant was consummated in accordance with the terms thereof, and that thereupon the said Clarke ceased to have any interest in said partnership or its assets.

On or about April 3, 1917, defendant sold to the Samson Company his royalty contract with the company and received the sum of twenty-two thousand five hundred dollars. When plaintiff learned of this fact he asked defendant what he was "to get out of it," to which defendant replied, "You don't get a thing."

Upon an accounting, subsequent to the trial, it was stipulated that defendant received twenty-two thousand five hundred dollars; he was credited with two thousand five hundred dollars the payment made by him on account of the contract, and \$574.20, disbursements made by him, leaving net proceeds in his hands of \$19,425.80. Plaintiff waived all

claims for expenses and disbursements made by him, and the judgment in his favor was for one-third of said \$19,425.80.

It is proper to say and briefly to show herein that the defendant's version of the transaction between him and the plaintiff was, in material particulars, wholly at variance with that of the latter. The defendant testified that, at the time of the conference at the Hotel Stockton, it was understood that he and plaintiff owned the contract jointly. "I guess," he continued, "there is no question as to Mr. Keyes being a partner up to that time. Mr. Clarke understood it so, so did I." Referring to conversations leading up to the execution of the Keyes-Nims contract, witness said plaintiff told him "that he had a contract with the Samson Company by which he would make fifteen thousand dollars, and, outside of a thousand he wanted to pay on his house, he could put the entire balance into the business"; that as the expenses accrued each was to put in his share of the money. The witness said that he told plaintiff that Mr. Clarke was desirous of coming into the business; that plaintiff consented to Clarke coming in and "said we would divide it three ways, that we would each put up \$833.33, which would have to be paid to the Samson Company within two or three days." As to the meeting at the Hotel Stockton, which defendant said was on October 17th, he testified: "It was discussed that we would raise a fund of either five or ten thousand dollars each as a nucleus upon which to start our new plant. Mr. Clarke said, 'Mr. Keyes, are you ready to put up this money?' Mr. Keyes says, 'Yes, I will put up my money right off, right away.' . . . I said, 'Whether either one of you go in or not, I have decided I am going to take on this contract.' Mr. Clarke said, 'Anyone who doesn't put up his money doesn't get in.' Mr. Keyes said that was agreeable to him. He sanctioned that." Clarke and defendant each paid \$1,250 of the first payment of two thousand five hundred dollars to the Samson Company.

C. D. Clarke testified, regarding the meeting at the Hotel Stockton, as follows: "We discussed the financing of the contract with the Samson Company. I said, 'Boys, I am going to pay this money anyhow; I am going to take care of the contract.' And we each agreed to pay our share at once; that is to say, I agreed and Mr. Keyes agreed. I said, 'I will take one-third of it.' Mr. Keyes said he would pay one-

third of it. The matter of failure to pay was brought up and I said, 'Who fails drops out.' Mr. Keyes said, 'That is O. K.''' The witness said that defendant did not say at the meeting that he would carry plaintiff for his share of the money that was to be paid upon the Samson Company contract.

[1] But, in determining whether the findings of the court are supported, we are required only to look to the testimony presented by the plaintiff and, if sufficient, we may disregard, in such consideration, any adverse showing made by the defendant. It cannot be doubted that the testimony of the plaintiff amply supports all the vital findings made by the trial court; hence, the following must be regarded and accepted as the established facts of the case: That the Keyes-Nims agreement, as given above, was made and entered into by and between the plaintiff and the defendant; that the intention of the parties, as expressed or contemplated by said agreement, was, according to an admission by the defendant, to enter into copartnership with respect to all dealings and contracts which they might have or enter into with the Samson Sieve-Grip Tractor Company, and that they were each to have an equal interest in such dealings and contracts; that, after the said agreement had been made, one Clarke was invited to enter as a third party into the agreement, and upon the consent of the plaintiff as well as that of the defendant did join the two latter in the proposed arrangement as a party thereto; that Clarke and the defendant advanced their respective proportions of the aggregate amount of money required to carry out the agreement, and that the defendant agreed to advance the plaintiff's part thereof upon the agreement and understanding that the plaintiff, upon receiving certain moneys he had in prospect, would repay the defendant the money so advanced for plaintiff.

The theory of the respondent, and the complaint proceeds upon that theory, is that the relation between the plaintiff and the defendant as produced by the agreement was that of a partnership; and the court below so decided. Counsel further contends, however, that if, strictly, the relation so produced was not that of a partnership, it certainly was that of a joint adventure.

It is obvious that the agreement, as originally formed, contemplated that there should be a division between the plain-

tiff and the defendant of the profits derived from the business or enterprise in which they agreed to jointly engage, and to this extent the relation created between them by the agreement bears the earmarks of a partnership, which, as defined by our Code, is an "association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." (Civ. Code, sec. 2395.) On the other hand, the agreement related to a single transaction, viz., the procurement of a contract from the Samson Company whereby the plaintiff and defendant would be permitted and authorized to erect one or more plants and to sell said company's tractors in certain designated territory in the United States and Canada, the plaintiff and the defendant, as seen, to share equally in said contract and the profits accruing therefrom. [2] It is said by the authorities that one of the distinctions differentiating a partnership from a joint adventure lies in the fact that, while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. It is also said that another feature distinguishing a partnership from a joint adventure is the fact that a corporation incapable of becoming a partner may bind itself by contract for a joint adventure, the purposes of which are within those of the corporation. (23 Cyc., p. 453.) There are other features which differentiate the two relations, among which may be mentioned the element of principal and agent which inheres in the partnership relation, each partner embracing the character both of a principal and agent, being the former when he acts for himself in the partnership. (Story on Partnership, sec. 1; *Jackson v. Hooper*, 76 N. J. Eq. 185, [74 Atl. 130, 135].) In a joint adventure, no one of the parties thereto can bind the joint adventure.

[3] But there is a considerable amount of law upon this subject, the discussion of which here may well be regarded as academic, since it is a matter of absolutely no consequence, so far as the decision of this case is concerned, whether the relation created between the parties to this action is that of a partnership or a joint adventure, or a limited partnership, which we are inclined to believe it to be; for it is held by the cases that the resemblance between a partnership and a joint adventure is so close that the rights as between adven-

turers are governed practically by the same rules that govern partnerships. (15 Ruling Case Law, p. 500.) Accordingly, a joint adventurer, as a partner in a partnership may do, may sue in equity for an accounting of the profits flowing from the joint adventure. [4] It is true that one party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure, but the right thus to sue at law does not preclude a suit in equity for an accounting. (15 Ruling Case Law, p. 507.)

[5] The complaint here proceeds, as we have stated, upon the theory that the agreement between the parties involved the establishment of a partnership relation, and the court's decision was according to that theory, the interlocutory judgment decreeing a dissolution of "said partnership," that plaintiff is entitled to one-third of the net profits realized from "said partnership business," and that plaintiff have an accounting of said "partnership business" to determine the amount of said net profits, etc. Conceding that it is difficult to determine with accuracy from the pleaded facts and the evidence, or the agreement itself, whether the relation created by said agreement was a partnership or a joint adventure relation, still it is, of course plain that either one or the other of those relations is thus disclosed, and, since the enforcement of the rights of the parties may be accomplished by or through the agency of remedies applicable and pertinent alike to both relations, it is, as above suggested, a matter of no consequence here whether the relation between the parties be that of a partnership or that of a joint adventure. An accounting and a termination of the relation in either case may be had in a proceeding appropriate to such relief in a court of equity (*Jackson v. Hooper, supra*), and, therefore, if we assume that the relation between the parties was that of a joint adventure rather than that of a partnership, the decree herein comes as clearly within the issues made by the pleadings as though the complaint had specifically alleged that the agreement was a joint adventure. It follows that, whether the relation between the parties was that of a partnership or that of a joint adventure, the evidence is, upon its face, sufficient to have warranted the

court below in finding and adjudging, as it did find and adjudge, that the plaintiff was entitled to one-third of the profits realized from the joint enterprise which was the subject of the agreement between him and the defendant and to an accounting for the purpose of determining the extent or amount of such profits.

The second point made by the appellant is that the original partnership, if such it was, whereby the plaintiff and the defendant associated themselves together for the purpose of securing the contract referred to in their written agreement was never "launched"—that is, the partnership as then formed at no time proceeded to or did carry out the purposes for which it was organized.

The position of appellant with respect to that proposition may perhaps the better be stated in the language of his brief, viz.: "In the case at bar, the terms of the two contracts were inconsistent. There were two parties to the Keyes-Nims agreement. There were three parties to the Clarke agreement. Nothing was said in the Keyes-Nims agreement as to what amount of money each of the parties was to advance, or when. A condition precedent to obtaining an interest in the Clarke agreement was the payment of \$833.33 forthwith by each party who desired to 'come in.' Everything done by appellant in protecting the Samson contract, and subsequently disposing of said contract, was in pursuance of the Clarke agreement. After giving Keyes a reasonable time within which to advance his \$833.33, as stipulated in the Clarke agreement, he no longer considered that Keyes had an interest in the project. If Keyes had intended to rely on the original Keyes-Nims agreement, he should have declined to accept the three-cornered proposition made at the conference at the Hotel Stockton on October 17, 1916."

This position involves an attack upon the findings that the interests of plaintiff and defendant in "such partnership, as originally formed," were equal, each being entitled to three-sixths interest, and that on or about October 17, 1916, and prior to the procurement of the royalty contract from the Samson Company, "plaintiff and defendant, by mutual consent, both offered to C. D. Clarke one-sixth of their respective interests"; that Clarke accepted said offer and that thereupon each of the parties to the agreement, plaintiff, defendant, and Clarke, owned a one-third interest "in said partner-

ship" and its assets. It also involves the question whether there is a variance between the plaintiff's pleading and the proof—that is to say, whether the agreement declared upon by plaintiff is the agreement proved.

It is argued that, when Clarke was admitted into the partnership or association, upon the terms then agreed upon, viz., that each should contribute an equal amount to finance the concern, an entirely new contract was made which superseded and abrogated the original agreement between plaintiff and defendant; that Keyes having failed to pay his proportion of the amount which it was then agreed would be necessary to carry out the purpose of the association, he forfeited whatever rights he might have acquired in the new arrangement or agreement.

As has been shown, the plaintiff testified and the court found that when the agreement between him and the defendant was entered into it was agreed that he was to share equally in the profits, and that the defendant promised and agreed to advance for plaintiff his share of the expenses of the venture or partnership and also any other sums of money which might become due from plaintiff to the partnership, "until such time as plaintiff would be financially able to reimburse defendant for such advances." The plaintiff testified, as seen, that such was also the understanding and agreement between him and defendant at the time Clarke was brought into the arrangement or agreement.

[6] It is clear that, so far as plaintiff's right to a share of the profits realized from the enterprise is concerned, it is immaterial whether it be true or not that the circumstance of admitting Clarke into the association or partnership worked a new agreement which superseded and abrogated the original agreement between Keyes and Nims. The original agreement by Nims that he would advance whatever sums of money that might become due to the partnership from Keyes was reaffirmed by him at the time Clarke entered into the agreement as a party thereto. Moreover, Clarke was admitted into the partnership, if such it was, upon the consent and agreement of the plaintiff as well as that of the defendant; hence, if it was a new agreement, it was one which was made by all the parties, including the plaintiff. But, if the effect of the original agreement was to create a partnership relation between Keyes and Nims, as we believe it was,

the fact of the taking of Clarke into such partnership did not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between Keyes and Nims. The situation, upon Clarke entering the partnership, was simply this: That Keyes and Nims had entered into an agreement of partnership for carrying on a certain designated business, and before carrying out the purpose of the agreement, took into the partnership, already so established and formed, another party as a partner therein. There was nothing in the terms of the so-called "new agreement" different from those of the agreement between Keyes and Nims, except that said parties disposed of certain of their interests to the new partner and entered into an understanding that each of the three should contribute equally to the financing of the enterprise, should share equally in the profits accruing therefrom, and bear equally the burdens thereof. In fact, no more can be said of the effect of taking Clarke into the partnership than that it was either a qualification of the original agreement, to which Keyes as well as Nims actually subscribed, whereby another partner was taken in and the terms more definitely specified, or that it was merely an agreement subsidiary or ancillary to the original.

The cases cited by appellant are not in point here because the facts thereof are materially variant from those of this case. For instance, in the case of *Black v. Hunter*, 169 Cal. 632, [147 Pac. 463], cited by appellant, the original agreement, which involved a combination or association of the parties thereto for the purpose of effectuating a sale of particular tracts of land to the county of Los Angeles, to be used by the county for the erection thereon of a hall of records, had been entirely abandoned by the parties after a futile effort by them to make a sale of the properties. It appears that the parties to said agreement were one Hunter and the appellant Black, who, having learned that Rowan & Co., real estate brokers, had other lands which they were trying to sell to the county, to be used for the same purpose, took said Rowan & Co., in with them and made them parties to their agreement, the purpose being to put an end to the rival propositions of said brokers. It was this agreement that was abandoned because of a failure to make the sale. Subsequently Hunter and Rowan & Co. entered into a contract

whereby they agreed between themselves to secure the right to sell the same lands to the county and, if successful, to divide equally between themselves the commissions realized from the sale. The sale was effected by them, and they received the stipulated commissions, whereupon Black, who was not a party to the second agreement, brought suit to recover a share of the commissions, claiming that "the first contract was one of copartnership; that the second was not a substitution for it, but merely took Rowan & Co. into the transaction as an agent of the copartnership and, therefore, the cancellation of the second contract (and appellants admit that it is no longer in existence) did not abrogate the original agreement of copartnership." The supreme court, through Mr. Justice Melvin, held that the finding that the tripartite agreement had been terminated by the parties themselves and said agreement abandoned was fully sustained by the evidence. And, even if, as the appellant in that case contended, the original agreement had not been abrogated by the subsequent or tripartite agreement but was a part of the latter, the abandonment and cancellation of the tripartite agreement by all three parties thereto would necessarily have involved the abandonment and cancellation by said parties of the original agreement.

But be that as it may, in this case there was not an abandonment of the original agreement, by the acts of the parties themselves, as was true in the case above considered, nor was there any evidence or pretense that the agreement to which Clarke became a party was independent of any and all consideration of the original contract. Keyes had conceived and proposed the scheme to Nims, who, in writing, agreed with the former to enter upon its consummation with him upon the understanding that they should share equally in the profits resulting from it. Nims suggested to Keyes the advisability of "taking in Clarke," because the latter was able to assist in financing the proposed enterprise, and in taking him in, both Keyes and Nims acted with reference to, and in view of, the agreement between them as originally formed. They, in other words, merely brought Clarke into their agreement, as originally formed, as a party thereto with themselves. Indeed, there was nothing to take Clarke in on but the agreement, for the business itself to which the agree-

ment related had not been started or even the facilities for its operation obtained at that time.

The other cases cited by the appellant in their facts bear no nearer analogy to the instant case than does the case of *Black v. Hunter*, above considered. The principles discussed in those cases are therein soundly applied, but the facts to which they are therein applied are entirely different from those with which we are here confronted.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 24, 1919, and the following opinion then rendered thereon:

HART, J.—In his petition for a rehearing the appellant calls our attention to the fact that, in our original opinion, we overlooked the proposition urged by him in the briefs that the court below erred in allowing the plaintiff interest on the latter's share of the amount for which the defendant sold the royalty contract with the Samson Company. [7] The failure to consider the question of interest was purely an oversight, and, as it is an important question herein, it should have been considered, but we do not see the necessity of granting a rehearing for that purpose, and we will, therefore, consider and dispose of the point on this application without ordering a rehearing.

Counsel for appellant take the position that the demand declared upon by the plaintiff was uncertain or unliquidated, and that, therefore, it was error to include in the judgment against appellant interest on the amount awarded the plaintiff from the date of the sale and the payment of the money to appellant, which was April 3, 1917. In support of this position there are cited many California cases, of which the leading ones are: *Cox v. McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100]; *Easterbrook v. Farquharson*, 110 Cal. 311, [42 Pac. 811], and *Edwards v. Arp*, 173 Cal. 476, [160 Pac. 551].

The reason for the denial of interest on unliquidated demands is said to be "that the person liable does not know what sum he owes, and, therefore, can be in no default for not

paying." (*Cox v. McLaughlin, supra.*) But it is further said in that case: "We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. *Mix v. Miller*, 57 Cal. 356, decided since the adoption of the code, and *McFadden v. Crawford*, 39 Cal. 662, decided previously, attest the doctrine that in this state interest is allowable on such demands under some circumstances. These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors, without objection, and they were clearly in default, and in the latter case *the only question was as to value.*" (Italics ours.) This language is approvingly adopted into the opinion in *Easterbrook v. Farquharson*, 110 Cal. 317, [42 Pac. 811], *supra*.

In the case of *Robinson v. American Fish Co.*, 17 Cal. App. 212, 220, [119 Pac. 388, 391], the defendant had agreed with the plaintiff and a number of assignors of the latter to purchase fish from them, to be delivered to the defendant in the city of San Francisco. Action was brought by plaintiff to recover the aggregate sum of \$815.60, which amount represented the demands of the plaintiff and his several assignors for fish delivered by them to defendant. The court awarded judgment to plaintiff in the total sum sued for, together with interest thereon at the legal rate of seven per cent per annum from the date of the delivery of the fish. In that case, on appeal, it was strenuously insisted that the demands declared upon were unliquidated and that the trial court, therefore, erred in allowing interest from the date of the delivery of the fish. There was a dispute therein as to whether the price agreed upon for the fish was a cent and a half or two cents per pound. This court, disposing of the question of interest in that case, said:

"There is no merit in the contention that the plaintiff was not entitled to interest on the several pleaded claims from the twenty-third day of October, 1910—the day on which the fish mentioned in the complaint were sold and delivered to appellant. The quantity of fish sold to and received by appellant and the price to be paid therefor were definitely fixed and known to appellant. It was not necessary, in other words, to resort to evidence in court or to an accounting or by an accord between the parties to establish the amount due.

To the contrary, the amount was susceptible of ascertainment by simple computation. (*Cox v. McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100], and cases therein cited; *Easterbrook v. Farquharson*, 110 Cal. 311, 317, [42 Pac. 811]; *Courtney v. Standard Box Co.*, 16 Cal. App. 600, [117 Pac. 778].) Indeed, there seems to have been no dispute as to the quantity of fish delivered to appellant by Meng, and while there was some controversy involving the price per pound which Junta agreed to pay therefor—that is, whether the price agreed upon was a cent and a half or two cents per pound—still the total amount due at either price was capable of ready ascertainment by mere computation, and, therefore, required no accounting to reach the precise sum due. As is said in *Courtney v. Standard Box Co.*, 16 Cal. App. 600, [117 Pac. 778], so it is true here: ‘Whether interest has been allowed upon the theory that compensation is thus awarded plaintiff for the use of his money, past due (Civ. Code, sec. 1917), or as damages for defendant’s (appellant’s) wrongful withholding of said money from plaintiff (Civ. Code, sec. 3287), in either case the allowance was perfectly proper.’” (We also call special attention to the Courtney case, cited above in the Robinson case.) It should be stated that a petition for a hearing of the Robinson case by the supreme court after judgment by this court was denied.

The comparatively recent case of *Howard v. Hobson Co.*, 38 Cal. App. 445, [176 Pac. 715], was an action by one broker against another to recover one-half of the amount in excess of that for which certain real estate was to be sold for the owner, an agreement having been entered into by and between the brokers whereby they were to divide equally between themselves such excess amount. Judgment went for the plaintiff, with legal interest from the date of the sale of the property by the other broker. The evidence disclosed that the expenses incident to the negotiation and consummation of the sale of the property were to be deducted from the amount which the brokers were to receive as their compensation for effecting the sale. The contention on appeal in that case as to interest was, among other objections urged against the allowance of interest, that the demand sued on was unliquidated, and that, consequently, interest was not allowable prior to the date of the entry of judgment. That contention was rejected, and, among other things, this court said:

"As above stated, the moment that the sale of the ranch was fully effected and completed by the defendant, that moment the latter became indebted to the plaintiff in an amount equal to one-half of the net sum received by the defendant over and above that paid for the property to the owner of the ranch; and at that moment of time the amount due the plaintiff became certain and definite or capable of becoming readily so by the simplest of arithmetical calculation by the defendant of the difference between the 'excess amount' and the amount of the expense which it was necessary for it to incur to negotiate and consummate the sale. The defendant, of course, knew precisely what the expense of selling the ranch amounted to, and, of course, knew the 'excess amount' received, by him from the sale over the purchase price. The amount due the plaintiff, therefore, constituted, within the meaning of the law, a liquidated demand." The supreme court, it should be remarked, denied a hearing in that case after judgment in this court.

[8] In the present case the defendant, according to the findings, which are sufficiently supported, became indebted to the plaintiff in the sum to which the latter was entitled as a partner the moment that he (defendant) sold the royalty contract and received the money therefor. The plaintiff, it is true, sued for one-half of the amount received by the defendant for the royalty contract, while the court awarded him one-third of the amount only. But this did not make the demand uncertain or unliquidated. The defendant, it appears, at all times had control and management of the enterprise. He knew whether Clarke had or had not paid over his share of the amount agreed upon as the necessary total amount to launch the enterprise. The plaintiff appears to have had very little knowledge of what was going on in the prosecution of the ends of the copartnership, and it is probable, having heard that Clarke had withdrawn from the concern, that he sued on the theory that Clarke had never paid over his share of the working capital of the firm, and was, therefore, as a matter of fact, never a partner, and hence conceived that he was entitled to one-half of the profits of the enterprise, or of the amount for which the defendant sold the royalty contract. But, whether the defendant was entitled to one-half of the amount received for the royalty contract or to one-third only is entirely immaterial, so far as

the question of interest is concerned. The defendant knew, as we may assume from the findings, that the plaintiff had an interest in the partnership. What that interest was was a disputed question between them, but it was either a one-half or a one-third interest. As to this, then, the only question to be determined was as to the extent of the plaintiff's interest. Whether it was found to be one-half or only one-third, in either case the demand was certain, definite, and liquidated.

The cases holding that interest is not allowable is where the demand is based upon a *quantum valebat* or a *quantum meruit*, in which it must be determined upon the evidence what the amount is, or where the amount of the demand must be determined by an accounting or by an examination of numerous accounts and counterclaims. This is not such a case, as we have shown. As stated, the amount of the demand here was ascertainable by a mere determination of the question whether the plaintiff's interest was one-half or only one-third in the partnership, and the defendant himself, if he knew the plaintiff had any interest at all, knew whether it was the one or the other. Therefore, when we consider the reason upon which is founded the rule that, generally speaking, interest will not be allowed on an unliquidated demand prior to the date of the entry of judgment therefor, viz., "that the person liable does not know what sum he owes, and therefore can be in no default for not paying," we readily perceive that the demand sued on here does not come within that rule—that is, that it is not unliquidated in the sense that interest is not payable upon it from the date the money was received by defendant.

The case of *Easterbrook v. Farquharson*, *supra*, cited by the appellant, was where the plaintiff leased to the defendant's assignor certain real property, upon which the lessor was to and did erect a building, under an agreement that on the last day of the term of the lease the lessor would pay the lessee two-thirds of the appraised value of the building, to be ascertained by three appraisers, one of whom was to be selected by the lessor, one by the lessee, and the third by the two so selected. The two appraisers appointed by the parties failed to select a third, and themselves failed to agree upon the value of the building. Some six months thereafter, nothing further having been done in the matter of the appraisal

of the value of the building, although the lessor and lessee in the meantime had considerable negotiations looking to an adjustment of the matter, the lessor brought suit, setting forth the facts and the impracticability of securing an appraisalment by the scheme agreed upon by him and the lessee, averring his readiness at all times to pay the defendant (lessee) two-thirds of the cash value of the building, and asking the court to determine the value of the building at the date of the termination of the lease, and so fix the amount due from him to defendant. The trial court found the value of the building, and, while in its findings it did not fix upon the plaintiff or his appraiser the responsibility for failure to agree upon an appraisalment, nevertheless allowed interest on the amount found to represent the value of the building from the date of the termination of the lease. The supreme court held that the allowance of interest from the date of the termination of the lease was erroneous, and said: "To entitle respondent to interest as damages he must bring himself within the terms of section 3287 of the Civil Code. That section awards interest to every person who is entitled to recover damages, certain, or capable of being made certain, by calculation, where the right of recovery is vested in him upon a particular day. But damages are the compensation for the unlawful act or omission of another (Civ. Code, sec. 3281), and, as has been said, appellant had been guilty of no wrong. He went into court asking a settlement of his account with respondent, and under section 1917 of the Civil Code the sum bore interest only from the day of its judicial ascertainment."

It is plainly manifest that the above case is not in point here, and is no authority against the allowance of interest in the present case from the date the right of recovery was vested in the plaintiff, which was the time when the defendant received the money for the royalty contract.

It is not necessary to review the case of *Edwards v. Arp*, 173 Cal. 476, [160 Pac. 551], *supra*, also cited by appellant in the petition, it being only necessary to say that in its facts it presents an entirely different situation upon the question of interest from that we find here.

The appellant further asks in his petition that the case be reopened for a further review of questions considered in the original opinion. We are satisfied with the views expressed and the conclusion announced in the former opinion as to the

legal nature of the agreement between the parties hereto and the effect of making Clarke a party to said contract. We may repeat, though, what we have already said, that we do not consider that the contract sued on is at variance with the one proved. The fact merely is, according to the result reached by the trial court from the proofs, that the plaintiff sued upon the theory that he had a larger interest in the partnership than he in fact was entitled to. Thus the situation is the same as where a party sues for a certain sum alleged to be due under a contract with the defendant, but the proof shows that he is entitled to judgment for a less sum than that demanded by his complaint. Such a result, of course, does not mean that the plaintiff sued on one contract and proved and recovered on another.

The petition for a rehearing is *denied*.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 2007. Third Appellate District.—August 26, 1919.]

PHILIP F. MOTT, Appellant, v. FRANK E. WRIGHT et al.,
Respondents.

CHESTER E. KING, Appellant, v. FRANK E. WRIGHT
et al., Respondents.

A. R. MacSWAIN et al., Appellants, v. FRANK E. WRIGHT
et al., Respondents.

[1] MECHANICS' LIENS—ACTION TO FORECLOSE—COMPLETION OF CONTRACT—EVIDENCE.—In an action to foreclose a mechanic's lien, testimony that work or labor ceased on the building in question on a given date, that the last work necessary to be done on the building to complete the contract was performed on that date, and that the building was then completed and nothing more was to be done thereon, is equivalent to testimony that the contract was completed on that date, and from it the trial court was justified in so finding, if it believed such testimony.

[2] *Id.*—CESSATION FROM LABOR—CONSTRUCTIVE COMPLETION.—The cessation from labor by reason of the actual completion of the contract is not the cessation of labor which, under section 1187

of the Code of Civil Procedure, itself constitutes a constructive completion of the building or contract.

- [3] **ID.—CONFLICTING EVIDENCE—FINDING—APPEAL—INVALID CLAIMS.** In an action to foreclose a mechanic's lien, testimony tending to show that the building was completed at a later date than that testified to by the witnesses for the defendants, and as found by the court, merely raises a conflict in the evidence upon that issue, and the trial court having resolved such conflict in favor of the defendants, the appellate court is concluded by its findings, and claims of lien not filed within ninety days of the date of completion, so found, are ineffective.
- [4] **ID.—TIME FOR FILING CLAIMS—SUBSTANTIAL COMPLETION.**—All that the statute requires, to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion, and, in this case, the testimony shows that there was such a completion, if not more than that.
- [5] **ID.—ONE HUNDRED AND TWENTY DAY RULE—APPLICATION OF.**—The rule as to the one hundred and twenty days' period after cessation from labor within which claims may be filed has no application where there is an actual completion.
- [6] **ID.—OCCUPATION OF BUILDING DURING PERFORMANCE OF WORK—PRESUMPTION OF COMPLETION.**—Where the lien claimants do all their work after the occupation or use by the owner takes place, or while the owner is occupying or using the building, this occupation or use is not such as raises a conclusive presumption of completion under the statute.
- [7] **ID.—PERSONAL LIABILITY OF OWNER—WANT OF PRIVITY.**—Where there is no contract, either express or implied, between the owner and the lien claimants for materials furnished and labor performed, such owner cannot be held personally liable therefor.
- [8] **ID.—PERFORMANCE AT REQUEST OF CONTRACTOR—PLEADING—RECOVERY IN QUANTUM MERUIT.**—Where, in an action to foreclose a mechanic's lien, it is alleged in the complaint that the labor bestowed upon and the materials furnished for the building were so bestowed and furnished in pursuance of the contract between the contractor and the owner and were bestowed and furnished at the instance of the contractor, and no issue as to the reasonable value of the labor and the materials is submitted in the form of a common count, no recovery can be had against the owner in *quantum meruit*.
- [9] **ID.—APPORTIONMENT OF PRICE—CONTRACT SEVERABLE.**—Where the agreed price for performing a given contract is apportioned to each item according to the value thereof and not as one unit, such contract is not an entire one, but is severable. (On petition for rehearing.)

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. A. Gett and Johnson & Lemmon for Appellants.

Devlin & Devlin for Respondents.

HART, J.—The actions were brought to enforce mechanics' liens and were consolidated for trial. Judgment was rendered in favor of plaintiffs against Frank P. Williams, the contractor, and in favor of Frank E. Wright, the owner, for his costs; and that the plaintiffs were not entitled to liens upon the premises described in the complaints. The appeal is by plaintiffs from the judgment.

The owner, defendant Wright, entered into a contract with the contractor, defendant Williams, for the removal of a cottage from 11th and O Streets, in the city of Sacramento, to 24th and L Streets, in said city, and for the raising of said cottage and constructing flats underneath the same. The liens in question are sought to be enforced against the lot on 23d and L Streets. Work started on the flats about the middle of February, 1915, and continued without cessation until the twelfth day of May, 1915. From about March the owner occupied the upper portion of the building and later on tenants occupied the flats.

It was found by the court that defendant Wright entered into a contract with defendant Williams, "which said contract was never recorded in the office of the county recorder of Sacramento County," under which said contractor agreed to construct said building; that no notice of completion of said building or contract and no notice of cessation of labor were recorded: "that the said building and said contract were completed on the twelfth day of May, 1915. That subsequent to said twelfth day of May, 1915, the plaintiff Chester E. King repapered a portion of the hallway of the building located on said premises. That the papering of said hallway had been completed by said plaintiff Chester E. King prior to the twelfth day of May, 1915, but said papering was defectively done by said plaintiff Chester E. King, whereby it became necessary for him to repaper a portion of said hall-

way. That the cost of repapering said hallway subsequent to the said twelfth day of May, 1915, was the sum of \$2.40. That the condition of said hallway subsequent to the twelfth day of May, 1915, was a trivial imperfection in said work and was not such as would prevent filing of liens. That the cost of said repapering said hallway was trivial in comparison with the cost of the work and improvements that were done under said contract."

The liens which are sought to be enforced were filed, respectively, August 12, 15, and 18, 1915. The complaints alleged the completion of the work on June 1st.

It is strenuously argued by appellants that the finding that the building was actually completed on May 12, 1915, is unsupported by the evidence. The contractor testified that the last work he did was about May 28th or June 1st; Mott, the plumber, said that he went to the building on June 2d to fix a water-pipe; and King, the painter and paper-hanger, testified that he worked personally on the building about the 14th or 15th of May and that in the week ending May 29th one man worked there. King produced his "labor-book" showing the following entries: "May 15. Bert Renner. \$2.50. May 29. Pape. \$2.00." The last item was explained to have been for repairing in the hall where the plaster had burned through the paper. It was also explained that the men working for Mr. King turned in their time-cards every Saturday, showing the time they had worked during the week; that the time-cards were destroyed and the total paid each man entered in the labor-book at the week-end. Consequently the item of May 15th covered work that may have been performed on any day between the 10th and 15th, both inclusive, and the work shown by the item of May 29th may have been done on any day between the 17th and 29th, both inclusive.

The testimony on behalf of respondent on this point was as follows: M. F. Trebilcox testified that the two lower flats were rented to tenants who took possession on April 1st. Mr. Dunn, one of the tenants, testified that he took possession on April 7th of the east lower flat; that at the time it was finished and ready for occupancy and there were no mechanics working in the building after that except, he believed, some painters were working on the garage, and he did not think they had finished upstairs; he thought the west flat was also

finished; that some carpenters were working "for maybe a week or more." Defendant Wright testified that he moved into the building the 1st of March; that labor ceased on May 12th and at that time there was no further work to be done on the property, either the upper part or the lower flats. Mr. Wright's wife corroborated his testimony.

The discussion to follow will be the better understood by first reproducing herein the provisions of section 1187 of the Code of Civil Procedure pertinent to the points advanced here by the appellants. Said section provides that every person save the original contractor "claiming the benefit of this chapter [on the enforcement of liens of mechanics, laborers, and materialmen], within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he is employed, must file for record . . . a claim of lien . . ." The said section further provides: "Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any buildings . . . shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: the occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may, within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. . . . In case such notice be not so filed, then the said owner and all persons derailing title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this

chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

The appellants insist that the evidence without conflict shows that there was not an actual completion of the building under the contract on the twelfth day of May, 1915, but that there was only a constructive completion by cessation from labor on said day. But in this they are mistaken. [1] Wright, the owner, testified, it is true, that work or labor ceased on the building on the twelfth day of May, 1915. He also testified, as seen, and Mrs. Wright corroborated him, that the last work necessary to be done on the building to complete the contract was performed on the twelfth day of May and that the building was then completed and nothing more was to be done thereon. Of course, that testimony was the equivalent of testimony that the contract was completed, and from it the trial court was justified in so finding, if it believed the testimony, as obviously it did. [2] Manifestly, there must have been a cessation of labor when the building was completed according to the terms of the contract, but the cessation from labor by reason of the actual completion of the contract is not the cessation from labor which, under section 1187, itself constitutes a constructive completion of the building or contract.

[3] There is, it is true, some testimony slightly tending to show that the actual completion occurred at a later date, which would render the liens effective, but this merely raised a conflict in the evidence upon that issue which the trial court resolved, as it was within its constitutional province to do, in favor of the defendants. This court is, as is well understood, concluded by the findings so made, and must accept as the fact that the building was actually completed according to the terms and requirements of the contract on the twelfth day of May, 1915. It follows therefore, that the appellants filed their claims too late to render them effective or of any force.

[4] As to the work of repapering a portion of the hallway on May 29, 1915, by King, who had the contract for papering the house, the uncontradicted testimony upon that

point shows that said work of repapering occurred after King had finished his contract. Wright, the owner of the house, called on King after the building had been in all respects completed, and, informing him that there was a defect in the papering in the hallway, requested him (King) to repaper the defective part, and, as seen, on the twenty-ninth day of May, King did so. This work of repapering required, according to the testimony, approximately two hours' time. If the testimony of King as to this matter is to be accepted, the defect in the papering was not due to any remissness or lack of proper skill or care on his part in doing the work originally, but to some circumstance or fact subsequently occurring and over which he had no control; and if this be true, the work of repapering was as far removed from any consideration of the original contract as though the papering had naturally become defective from long use. But however that may be, it is clear that if the original papering was defectively done and the repapering was for that reason required to be done, it amounted to a trivial imperfection only in the work, within the meaning of that language in section 1187. All that the statute requires, to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion, and, in this case, the testimony shows that there was such a completion, if, indeed, not more than that. (*Willamette etc. Co. v. Los Angeles College Co.*, 94 Cal. 229, 237, [29 Pac. 629]; *Harlan v. Stufflebeem*, 87 Cal. 508, [25 Pac. 686]; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 379, [51 Pac. 555]; *Schindler v. Green*, 149 Cal. 752, 754, [87 Pac. 626]; *Bianchi v. Hughes*, 124 Cal. 24, 27, [56 Pac. 610]; *Jost v. Sullivan*, 111 Cal. 286, 292, [43 Pac. 896].)

[5] The foregoing, of course, disposes of the proposition earnestly urged by the appellants that the completion was not actual but by cessation from labor, and that, therefore, they were entitled to file their liens at any time within one hundred and twenty days from the date of the cessation from labor, and that in that view their liens were seasonably filed under the law. But there is some intimation by appellants in their briefs that the one hundred and twenty days' limitation applies in all cases of completion, whether actual or statutory, and they cite as supporting that view the cases of

Buell v. Brown, 131 Cal. 158, [63 Pac. 167], and *Farnham v. California Safe Deposit & Trust Co.*, 8 Cal. App. 266, [96 Pac. 788].

In each of those cases the lien claimants relied upon a constructive completion of the contract by cessation from labor, and it was held that where a contract has not been actually completed but there was a constructive completion by cessation from labor for the period of thirty days, and no notice of such cessation had been filed by the owner with the office of the county recorder, lien claimants have ninety days from and after the expiration of the thirty days of cessation from labor within which to file their liens. In other words, in such case lien claimants relying on completion by cessation from labor are, like those relying on actual completion, limited, as to the time within which they may file their liens, where the owner has failed or neglected within the prescribed period to file with the county recorder a notice of the cessation from labor, to ninety days from the time that there has been a completion by cessation from labor (thirty days from and after the time of such cessation) within which to file their liens, or one hundred and twenty days from the date of the cessation from labor. But, in this case, there was an actual completion, and the rule as to the one hundred and twenty days' period can have no application where there is an actual completion. The statute plainly provides that all claims of lien must be filed within ninety days after the completion of any building, improvement, etc., and, as a matter of fact, that provision, as above suggested, applies not only to cases of actual completion, but also to those of constructive completion, including completion by cessation from labor, for in the latter case, as is obvious, there is no completion until there has been a cessation from labor for the period of thirty days, from and after which time the lien claimant has, by virtue of the estoppel arising against the owner upon his failure to file with the county recorder notice of the cessation from labor, ninety days within which to file his lien.

Counsel for the respondents state in their brief that the appellants claim, for the first time on this appeal, that there was a constructive completion of the contract through occupation and use of the building by the owner. But counsel for appellants make no such contention here. Indeed, in

their closing brief they positively declare that there is no ground afforded by the record for any such claim, and in this they are clearly right. The owner never ceased occupying the building at any time pending the reconstruction or alteration thereof, except during the brief time the building was in the course of removal from Eleventh and O Streets to Twenty-third and L Streets, in Sacramento. [6] The lien claimants here involved did all their work after the occupation or use by the owner took place, or while the owner was occupying and using the building. This, quite clearly, is not such an occupation or use as raises a conclusive presumption of completion under the statute. (*Orlandi v. Gray*, 125 Cal. 372, 374, [58 Pac. 15]; *Bosch v. Waldmann*, 31 Cal. App. 245, 255, [160 Pac. 180].)

[7] It is lastly contended that, because the materials and the labor were furnished with the knowledge and consent of Wright, an implied contract arose between the claimants and Wright, and that having received the benefit of the labor performed and the materials furnished, Wright ought in equity and good conscience to be held to be personally liable and compelled to pay the appellants their claims. There are two answers to this proposition, viz.: 1. As the court found, upon sufficient evidence, to be true, the materials and labor were furnished to Williams, the contractor, and, as is necessarily implied from that finding, the materials and the labor were not furnished to Wright. In other words, there was no contract, either express or implied, between the materialmen and the laborers and the owner. There was, therefore, no privity of contract between the defendant Wright and the several lien claimants. Obviously, to sustain an action against Wright it must be upon the theory that he is personally liable, and to render him personally liable, there must be shown to exist a contract, express or implied, or a contractual privity, between him and those claiming liens. [8] 2. The complaints, in neither counts thereof, submit any issue as to the reasonable value of the labor and the materials in the form of a common count. It is true that the complaints are in two counts, but in both it is alleged that the labor bestowed upon and the materials furnished for the building were so bestowed and furnished in pursuance of the contract between the contractor and the owner and were bestowed and furnished at the instance of the contractor.

There is no allegation in either count of the complaints that the materials were furnished for and the labor done on the building at the direct instance of Frank E. Wright, the owner, or at his instance at all. There is, in short, no attempt to rely upon a common count in the form of a *quantum meruit*. While the second count in each of the complaints alleges that the materials and the labor were "of the reasonable value of" the respective amounts of the several claims, the right to the enforcement of the payment of said claims is expressly and primarily based upon the contract between Williams and Wright and upon the theory that said materials and labor were furnished and bestowed at the instance of Williams, the contractor.

The case of *Southern California Lumber Co. v. Schmitt*, 74 Cal. 625, 626, [16 Pac. 516], was decided when section 1183 of the Code of Civil Procedure provided that all contracts for work on buildings or other improvements, where the amount agreed to be paid thereunder exceeded one thousand dollars, should be in writing and filed by the owner in the office of the county recorder, in default of which the contract became wholly void and no recovery could be had thereon, and that in that case the work done and the materials furnished thereunder were to be deemed to have been done and furnished at the personal instance of the owner, and that laborers, mechanics, and materialmen doing work thereon and furnishing materials therefor should have a lien for the value thereof. Answering the argument made in that case that, notwithstanding that no liens were filed for the enforcement of the plaintiff's claim for furnishing materials for a building constructed for the owner by a contractor, a personal judgment for the value of the materials could be entered and enforced against the owner, the supreme court said:

"It is claimed, although no lien exists on the building as to the contractor, and those who may claim under him, and none as to the materialman, that nevertheless, according to section 1183 of the Code of Civil Procedure, the plaintiff ought to have had a personal judgment against Schmitt, with whom he never had any contract to furnish the building materials. . . .

"We cannot agree with the appellant in a case where neither the contractor nor the materialman has filed any lien, such as is given them by statute, that under the section,

supra, a personal judgment for the value of the materials furnished may be had against the owner of the building, who did not purchase them, and who was under no contract with the materialman, either express or implied, to pay for them." (See, also, *Davies-Henderson L. Co. v. Gottschalk*, 81 Cal. 641, 647, [22 Pac. 860]; *First Nat. Bank v. Perris*, 107 Cal. 55, 64, [40 Pac. 45]; *Marchant v. Hayes*, 120 Cal. 137, 139, [52 Pac. 154].)

The cases relied upon by appellants as supporting their position that they are entitled to a personal judgment against the owner of the building are: *Castagnino v. Balletta*, 82 Cal. 250, [23 Pac. 127]; *Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, [126 Pac. 167], and *Gentile v. Britton*, 158 Cal. 328, [111 Pac. 9]. But the decisions in those cases proceed upon a very much different state of facts from that with which we are confronted in this case. In *Castagnino v. Balletta* the action was by the contractor against the owner, between whom and the former a contract had been entered into for the construction of certain buildings. The complaint declared upon two counts, one being for the foreclosure of a mechanic's lien and the other in *indebitatus assumpsit*, or a common count, founded upon the proposition that the original contract had been departed from in material respects in the construction of the buildings. That is not this case.

In *Acme Lumber Co. v. Wessling* the action was for the foreclosure of a lien for work done under an oral and consequently an unrecorded contract between the contractor and a tenant in possession of the real property upon which the improvement was made. It was made to appear that the owner had knowledge of the improvement being made on his premises, but that he failed to file the notice of nonresponsibility prescribed by section 1192 of the Code of Civil Procedure, and it was, therefore, held that, by virtue of the terms of said section, it was to be presumed that the improvement was constructed or made at the instance of the owner of the premises, and said premises were subject to the lien filed for the materials and labor used in the work of improvement. But it is claimed or intimated that in that case the complaint proceeded upon a *quantum meruit* against the owner of the premises and that the appellate court held that it was proper to do so. But, even so, that case is not in point here, for the reason that between the plaintiff therein, who was the assignor

of the contractor, and the owner there existed a privity of contract, created by the terms of section 1192.

Gentile v. Britton is another case where section 1192 was applied, the improvement having been made under a contract between the contractor and a party not the real owner of the premises upon which the improvement was made. The conditions pointed out by said section 1192 to render the premises subject to a lien for the labor and materials used in the improvement were found to exist in that case, hence an equitable lien was created on the premises to secure the payment of the value of the labor and materials. It is obvious that section 1192 has no application to the facts of this case.

We have been shown no reason for disturbing the judgment, and it will, therefore, stand affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 25, 1919, and the following opinion then rendered thereon:

HART, J.—Appellants have filed a petition for rehearing in which several points are raised. [9] The first one is, that the contract in question was an entire and not a divisible one. The contract was made by Wright, the owner, with Williams, the contractor, and provided for the erection of a six-flat building upon a lot at Eleventh and O Streets, in the city of Sacramento, for the consideration of nine thousand five hundred dollars. Said contract also contained the following provision:

“It is hereby agreed that in consideration of receiving the above contract, the party of second part will furnish plans, and superintend the moving and erection of flats under present house, the location to be 23rd and L sts., without commission or consideration, it being understood that this work is to be done at absolute cost to the owner. The cost of remodeling not to exceed \$1800 and moving not to exceed \$125. He will also agree to superintend erection of garages and other work on lot which owner may desire under above conditions.”

The specific point made is, that the work on the O Street property was not completed until June 4 or June 12, 1915, which is "the true date from which the tolling of the limitation of time within which liens may be filed is to be computed," and not May 12, 1915, the date of the completion of the work on the L Street property.

In neither appellant's opening brief nor in his reply brief is there one word concerning the Eleventh and O Streets property. Indeed, there seems from the record not to be any occasion for referring to that property, because there is nothing in the pleadings, nothing in the findings, nothing in the evidence, and nothing in the judgment having any reference to the O Street property except incidentally it is mentioned by one of the witnesses. The liens were all filed against the Twenty-third and L Streets property and there was no issue in the case regarding the O Street property. If questions can be raised for the first time in the petition for rehearing, there would never be an end to litigation. It has in many cases been held that where a case has been decided, a new point raised in appellant's reply brief or in the petition for rehearing will not be considered. (*Buena Vista Oil Co. v. Park Bank of Los Angeles*, 39 Cal. App. 716, [180 Pac. 12]; *Camp v. Boyd*, 41 Cal. App. 83, [182 Pac. 60]; *Hibernia Sav. & Loan Soc. v. Farnham*, 153 Cal. 578, [126 Am. St. Rep. 129, 96 Pac. 9]; *Flores v. Stone*, 21 Cal. App. 105, [131 Pac. 348, 351, 352].) However, in this case, we will consider the point raised.

In 13 C. J., page 563, it is said: "If the consideration is single, the contract is entire, but if the consideration is either expressly or by necessary implication apportioned, the contract will be regarded as severable. . . . Where the portion of the contract to be performed by one party consists of several and distinct items, and the price to be paid is apportioned to each item according to the value thereof and not as one unit in a whole or in a part of a round sum, the contract will ordinarily be regarded as severable."

In Elliott on Contracts (volume 4, section 3667) it is said: "A building, construction or working contract is entire and not divisible, where it is for an entire structure for a stated compensation. . . . If the price is apportioned among the several items or to the different parts of one item, the contract will generally be construed as severable."

In the case at bar "the price was apportioned to each item according to the value thereof and not as one unit," and we hold that the contract was not an entire one, but was severable.

As to the remaining points raised in the petition, that "provisions as to trivial imperfections were designed merely to prevent premature filing of liens" and that "slight work after substantial completion, done at request or with consent of owner or subcontractor, extends time for filing liens," we are satisfied with what is said in the main opinion.

The petition for a rehearing will be denied.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 23, 1919.

All the Justices concurred.

[Civ. No. 3087. First Appellate District, Division One.—August 26, 1919.]

JOHN REID, Jr., Petitioner, v. THOMAS F. BOYLE, as Auditor, etc., Respondent.

[1] MUNICIPAL CORPORATIONS—SAN FRANCISCO—EMPLOYMENT OF CITY ARCHITECT—FIXING COMPENSATION ON PERCENTAGE BASIS.—The board of public works of the city and county of San Francisco has authority to employ a "city architect" to prepare plans and otherwise render services in connection with the erection of city buildings and to fix his compensation at a given percentage of the cost of construction, payable as the work progresses. Such person does not become an employee or an officer of the city, in the ordinary sense, nor is he engaged in an employment requiring a fixed monthly compensation.

PROCEEDING in Mandamus to compel the auditor of the City and County of San Francisco to audit a claim for services as architect. Writ issued.

The facts are stated in the opinion of the court.

Cullinan & Hickey for Petitioner.

George Lull, City Attorney, for Respondent.

J. G. De Forest, *Amicus Curiae*.

WASTE, P. J.—In this proceeding, as was the case in *Miller v. Boyle*, *post*, p. 39, [184 Pac. 421], the petitioner is seeking an alternative writ of mandate directed to the respondent as auditor of the city and county of San Francisco, requiring him to audit a claim in the sum of \$180, alleged to be due as architect's fees for the preparation of preliminary studies for plans and specifications for a residence building, for the use of the chief of the fire department of the city and county. The facts are in all particulars, with one essential difference, so similar to those presented in the *Miller* case, *supra*, that we will only state the additional matter in controversy. The two cases were argued and submitted to us for decision upon the facts set forth in the petition and the law as raised by the demurrer.

After the passage of the ordinance authorizing the board of public works, in its discretion, to obtain plans, drawings, specifications, and details for the erection of public buildings, referred to in the *Miller* case, the board of supervisors of the city and county, by resolution regularly adopted, directed the board of public works to prepare plans and specifications for a building suitable and adapted for residential purposes, for the chief engineer of the fire department of the city, and to submit the same, when so prepared, first to the board of fire commissioners, and then to the board of supervisors for approval and action thereon. Thereafter, by resolution, duly adopted, the board of public works appointed John Reid, Jr., the petitioner here, city architect. The resolution provides "that the duties of the city architect shall be to prepare plans and specifications for all public buildings, works, or improvements, for which the board of public works shall direct him to prepare such plans and specifications, and to supervise the construction of all public buildings, works, or improvements, the construction of which the board of public works shall direct him to supervise." The resolution also provides that the compensation of such city architect "shall be six per cent of the total cost of the construction of the respective

public buildings, works, or improvements, plans and specifications of which he shall so prepare, and the construction of which he shall so supervise; provided, however, that if he prepares the plans and specifications, when directed by the board of public works, as aforesaid, but is not directed to, or does not, supervise the construction of any particular public building, work, or improvement, his compensation in preparing such plans and specifications alone shall be four and one-half per cent of the total cost of the construction of such building, work, or improvement." The resolution then provides for partial payments as the work progresses, one-fifth of the entire compensation for the entire work to be paid upon the completion of the preliminary studies for plans and specifications for any particular public building. Until the actual cost of construction of any particular building, work, or improvement, shall be ascertained, the payments on account of such compensation of the city architect shall be based upon the estimated cost of the construction.

The resolution recites the authorization and direction to the board of public works, by the board of supervisors, to prepare plans and specifications for the fire chief's house, then directs the city architect to prepare plans and specifications for that building, and superintend its construction, his compensation for such services to be six per cent of the total cost of the building, which total cost is estimated at twenty thousand dollars. Further direction to prepare plans and specifications for the Galileo high school is contained in the resolution.

Immediately after the adoption of the resolution of the board of works last mentioned, the petitioner accepted such appointment as city architect, upon the terms stated in the said resolution, at once entered upon the performance of his duties as such, and ever since has been, and now is, the duly appointed and acting city architect of the city and county of San Francisco. In the discharge of these duties he thereafter prepared and completed the preliminary studies for plans and specifications of the fire chief's residence, the estimated cost of the construction of which, when said preliminary studies were completed, was found to be fifteen thousand dollars. The preliminary plans were delivered to, and accepted by, the board of public works. One hundred and eighty dollars is the correct amount of the installment of the fee

due under the terms of his employment, which, as in the case of *Miller v. Boyle, supra*, are the identical terms of employment for architects engaged in the general practice of the profession of architecture in the city and county of San Francisco.

[1] Under the provisions of the charter of the city and county of San Francisco (subd. A, sec. 11, art. XIII), the city architect is exempt from the provisions thereof relating to classification of employees by the civil service commission. The respondent in the instant case makes no contention, therefore, that the civil service provisions of the charter apply to petitioner, but bases his refusal to audit the claim on the ground that it arises out of a fee and compensation of an architect computed upon the cost of the construction of a public building. In other words, as we understand it, respondent's contention is that, under the provisions of the charter, the city architect is an employee of the city under the appointment by the board of public works, and that his compensation must be a fixed salary, payable monthly. He relies upon section 1, chapter 4, article III, which, in part, reads: "The salaries and compensation of all officers, including policemen, and employees of all classes, and of all teachers in public schools, and others employed at fixed wages, shall be payable monthly."

No express provision is made by the charter of the city and county of San Francisco creating the office of city architect. The only reference to such position found in the charter is its enumeration in the list of positions exempted from the civil service provisions. No salary is fixed and no method of compensation is provided. Assuming, therefore, that under its implied powers it created such an office, there still remains the question as to how the compensation attached to the office shall be paid. There seems to be a reasonable analogy between the situation thus presented and the facts existing in the line of cases in which the right has been upheld of city councils and boards of supervisors of counties to employ special assistants, particularly for the rendition of legal services, and to compensate them by a certain amount of the amount recovered in litigation. We are not inclined to hold that the ordinance directing the board of public works, in its discretion, to obtain plans for public buildings of the city and the resolution of the board of public works appointing

petitioner city architect can be held to make petitioner thereby an employee, or an officer of the city, in the ordinary sense, or an employment requiring a definite fixed monthly compensation. His duties are to prepare plans and specifications only for such public buildings, works, or improvements as may be directed by the board of public works, and for a compensation already agreed upon and fixed by resolution. Until the board directs performance of the services, and they are performed, no claim arises against the city by virtue of the office. Nothing contained in oral argument, or in the briefs of the parties, causes us to waiver in our opinion that, under such circumstances, the board of public works adopted a reasonable and customary means of availing itself of the services of petitioner. Under the facts of the instant case the question whether or not petitioner holds the position styled "city architect" is a false quantity for consideration.

No reason presents itself to us why the city was not empowered by its charter to enter into the arrangement made with the petitioner. Having done so, through its authorized agency, the board of public works, and petitioner, with his own private organization, having performed his part of the contract, the fruits of which have been accepted by the city, petitioner is entitled to compensation for his work.

If, in the judgment of the board of public works, which has full power and authority over such matters, the employment of petitioner was proper and in accord with the conduct of such business in the community, the compensation agreed upon appearing to be just and reasonable, we see no reason why petitioner is not entitled to have his claim audited.

What we said in the case of *Müller v. Boyle*, *supra*, disposes of all other contentions made by the respondent.

Let the writ issue as prayed for.

Bardin, J., *pro tem.*, and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 23, 1919.

All the Justices concurred.

[Civ. No. 3089. First Appellate District, Division One.—August 26, 1919.]

J. R. MILLER, Petitioner, v. THOMAS F. BOYLE, as Auditor, etc., Respondent.

- [1] **MUNICIPAL CORPORATIONS—SAN FRANCISCO—ERECTION OF SCHOOLHOUSE—EMPLOYMENT OF ARCHITECT.**—Under the charter of the city and county of San Francisco, the board of public works is not bound to engage architects exclusively as “employees,” at stated monthly salaries, or at a given *per diem*, but may engage an architect by special contract, to prepare plans and specifications for use in connection with the erection of a schoolhouse at his own time and expense, for a stipulated fee based on the cost of the construction work to be planned and supervised by him.
- [2] **ID.—ACCOMPLISHMENT OF GIVEN RESULT—MEANS NOT PRESCRIBED—ADOPTION OF REASONABLE MEANS—POWERS OF MUNICIPAL BOARDS.**—When the charter permits a certain result to be accomplished, but does not prescribe the means, any reasonable, or suitable, means may be adopted. A municipal board not only has the powers expressly enumerated in the organic act, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly, or impliedly, prohibited.
- [3] **ID.—EMPLOYMENT OF ARCHITECT UPON PREVAILING TERMS—REASONABLE MEANS—LETTING OF CONTRACT TO LOWEST BIDDER—CHARTER NOT VIOLATED.**—The employment by the board of public works of the City and County of San Francisco of a duly authorized architect to prepare plans and specifications for use in connection with the erection of a schoolhouse, upon the terms and conditions prevailing in the community, constitutes the adoption of a reasonable and suitable means of accomplishing the required result, and is not in violation of the provisions of the charter requiring the awarding of contracts to lowest bidders.
- [4] **ID.—RECEIPT OF BENEFITS BY MUNICIPALITY—ESTOPPEL TO DENY LIABILITY.**—Where the board of public works of the city and county of San Francisco, acting under the general power granted it to erect schoolhouses, hires an architect to prepare the necessary plans and specifications, such municipality, after it has received the benefit of his labor and expenditure of time and money, may not be heard to say that he should not be compensated as agreed.

4. Estoppel as applied to governmental bodies, note, 137 Am. St. Ecp. 354.

PROCEEDING in Mandamus to compel the auditor of the City and County of San Francisco to approve a claim and demand for services as architect. Writ issued.

The facts are stated in the opinion of the court.

Cullinan & Hickey for Petitioner.

George Lull, City Attorney, for Respondent.

J. G. De Forest, *Amicus Curiae*.

WASTE, P. J.—This is an application by the petitioner, who is a duly licensed, certified, and authorized architect, for an alternative writ, to be directed to the defendant as auditor of the city and county of San Francisco, requiring him to approve a claim and demand of petitioner for the sum of \$1,205.66, alleged to be due as fees for services as architect, rendered the city and county. The claim was properly presented and duly allowed and approved, until it reached the defendant, who declined to audit the same, upon the ground that the petitioner herein was not employed in accordance with the civil service provisions of the charter of the city and county of San Francisco, and that the claim is not for a regular, stated salary, or based on a *per diem*. He further contends that the contract for the preparation of the plans and specifications of the schoolhouse, and supervision of such construction, should have been let to the lowest bidder, in accordance with the provisions of sections 14, 15, 16, 17, and 18 of chapter 1 of article VI of the charter. The facts behind the application are admitted to be correctly set forth in the petition. The matter is submitted to this court on questions of law, raised by the demurrer of respondent.

It appears that by ordinance of the board of supervisors of the city and county, the board of public works is authorized, in its discretion, to obtain plans, drawings, specifications, and details for the erection of public buildings for the city and county of San Francisco, to be erected under the supervision and direction of the board of public works, and for that purpose to engage the services of architects, either by selection or by competition. The method of competition in case the architects, for the purposes specified in the ordinance,

are selected by competition is to be determined by the same board. Likewise, that board is authorized to pay for the preparation of details, plans, and drawings and necessary supervision of the work of construction a sum which (including the cost of the preparation of the contract, plans, and specifications) shall not exceed six per centum of the entire cost of the building to be constructed. The ordinance further authorizes the board of works to enter into contracts with architects for the purpose of engaging the services therein contemplated. Another provision of the ordinance declares that nothing therein contained shall be deemed, or construed, as preventing the board of public works from appointing a city architect, or such persons as that board may deem necessary, to perform architectural services for the city and county, or to inspect and supervise the construction of public bulidings, it being the intent and purpose of the ordinance, so it declares, to place in the discretion of the board of public works the manner and method of obtaining plans and specifications for public buildings, and the supervision of the construction thereof.

The board of education of the city, after proceedings duly and regularly had in that behalf, requested the board of public works to prepare plans and specifications for a certain schoolhouse, to be known as the Jefferson School, and to be constructed in and by the city and county. The board of public works thereupon, by resolution duly adopted, appointed petitioner, the architect, to prepare plans and specifications for such schoolhouse at an estimated cost of construction of approximately one hundred thousand dollars, and in and by said resolution it was provided that the fee of petitioner for such services should be six per cent of the total cost of the construction of the said schoolhouse, and that the services of the petitioner should include the necessary supervision of construction. It was further agreed by and between the board of public works, acting for the city, and petitioner, prior to his entering into his work, that the fee of six per cent should be paid at certain times and amounts, one-fifth of the fee to be paid upon completion and approval of the preliminary studies for the plans and specifications of the schoolhouse. It was likewise agreed that until the actual cost of the construction of the schoolhouse should be ascer-

tained the payments on account of petitioner's fee were to be based on the estimated cost of the construction thereof.

Thereupon, petitioner prepared the preliminary studies for the plans and specifications of said schoolhouse. In the preparation of these studies for the plans and specifications petitioner used his own private office and materials and employed draftsmen and assistants, paying the cost of said materials, and the wages of said draftsmen and assistants, out of his private funds. The estimated cost of the construction of the school, when the preliminary studies for its plans and specifications were completed, was \$100,471.66. These preliminary studies for the plans and specifications were delivered to and accepted and approved by the board of education and the board of public works. Thereupon, petitioner presented, as before stated, to the proper officers of the city and county his bill and demand, in proper form, for \$1,205.66. That claim the auditor refuses to approve.

It appears as a fact in the case that the fee of six per cent of the actual cost of the construction of the Jefferson School is not greater than the compensation paid to architects on similar employment in the city and county, and is the reasonable value of such services petitioner agreed to render. The fee of six per cent, and the times and amounts of progress payments, and the mode of payment, are the usual and customary mode, times, and amounts, respectively, of paying architects in the city and county of San Francisco, whether said architects be employed by the said city and county or by private persons.

The board of public works of the city and county of San Francisco has charge, superintendence, and control, under such ordinances as are from time to time adopted by the supervisors, of the construction of any and all public buildings and structures under plans duly approved by the various departments, including all schoolhouses and fire department buildings, and the repair and maintenance of any and all buildings and structures owned by the city and county. (Charter of the City and County of San Francisco, subd. 6, sec. 9, c. 1, art. VI.) The same board has power to employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects, and workmen as shall be necessary to a proper discharge of their duties under the article of the charter, and to fix their compensation; but no compensation

of any of said persons shall be greater than is paid in the case of similar employments. (Charter, sec. 3, c. 1, art. VI.)

[1] The first question to be decided in this case is, whether, by this language of the charter, the board of works is bound to engage architects exclusively as "employees," at stated monthly salaries, or at a given *per diem*, or whether it may engage an architect by special contract, to prepare plans and specifications at his own time and expense, for a stipulated fee based on the cost of the construction work to be planned and supervised by him.

The board of public works may employ any number of architects, as it employs all needed clerical forces and workmen, necessary to a proper discharge of the duties imposed by the charter. It may also fix their compensation on a monthly basis. (Charter, sec. 1, c. 4, art. III.) Such architects, when thus regularly employed, would, in our judgment, become employees of the city, and subject to the civil service provisions of the charter, except in the case of the city architect, with which case we are not now dealing. However, we do not find anything in the charter provisions, or in the general law, as we understand it, which will prevent the board of public works, in its discretion, securing the services of skillful architects, in any special case, to prepare such plans and specifications as may be needed. [2] When the charter permits a certain result to be accomplished, but does not prescribe the means, any reasonable, or suitable, means may be adopted. A municipal board not only has the powers expressly enumerated in the organic act, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly, or impliedly, prohibited. (*Harris v. Gibbins*, 114 Cal. 418-421, [46 Pac. 292].)

The right to employ an architect and prepare plans and specifications, therefore, was incident to the general power of the city to erect schoolhouses. (Dillon on Municipal Corporations, sec. 701; *Spalding v. Chamberlain & Co.*, 130 Ga. 649, [61 S. E. 533].) We find nothing in the charter which makes the employment of architects at a regular fixed salary, or *per diem*, the exclusive method by which the city might carry out this incidental power. The board of public works, clothed with general authority to construct and acting under the ordinance of the board of supervisors, had power to ac-

comply with a certain result, which could not be accomplished by it without the employment of other agencies, to wit, of architects, to prepare the plans and specifications for such erection. In this case, the charter not directly prescribing that such plans and specifications could only be prepared by such architects as might be regularly employed by the board of public works, it must be construed to afford opportunity for the adoption, as was said in *Harris v. Gibbins*, *supra*, "of any reasonable, and suitable, means."

[3] The claim of respondent that the contract between the board of public works and the petitioner should only have been awarded after compliance with the provisions of the charter relative to letting contracts to the lowest bidder has been disposed of adversely to his contention. The same cases also seem to establish that the board of public works, in employing a duly authorized architect, and upon the terms and conditions prevailing in the community, were adopting reasonable and suitable means, these decisions holding that the engagement of an architect to prepare plans and otherwise render services in connection with the erection of city buildings on a percentage basis is not in violation of the provisions of municipal charters requiring a written contract with the lowest and best bidders. "The reasonableness of such construction," said the court in one of these cases, "is strikingly illustrated in the present case. An architect is an artist. His work requires taste, skill, and technical learning and ability of a rare kind. Advertising might bring many bids, but it is beyond peradventure that the lowest bidder might be the least capable and most inexperienced, and absolutely unacceptable. As well advertise for a lawyer, or civil engineer for the city, and intrust its vast affairs and important interests to the one who would work for the least money." (*Cudell v. Cleveland*, 16 Ohio C. Rep. (N. S.) 374; *Stratton v. Allegheny Co. et al.*, 245 Pa. St. 519, [91 Atl. 894]; *City of Newport News v. Potter*, 122 Fed. 321, [58 C. C. A. 483]; *City of Houston v. Glover*, 40 Tex. Civ. App. 177, [89 S. W. 425].)

It being admitted that the terms and conditions of compensation provided in the contract entered into between the petitioner and the city are just and reasonable, and are the usual terms and conditions covering the rendition of similar

services in this community, we are of the opinion that the petitioner is entitled to the relief sought.

[4] Petitioner is also invoking the doctrine of estoppel, claiming that the city and county of San Francisco has received the benefit of his labor and expenditure of time and money, and should not now be heard to say that he should not be compensated. In view of the conclusion we have already announced, it is not necessary to rest our decision upon that contention, but we are of the opinion that what we said in a very recent case (*Warren Bros. Co. v. Boyle*, 42 Cal. App. 246, [183 Pac. 706]), does apply to the facts of this case.

Let the writ issue as prayed for.

Bardin, J., *pro tem.*, and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 23, 1919.

All the Justices concurred.

[Civ. No. 2807. First Appellate District, Division Two.—August 26, 1919.]

MACK MATHEWS, Administrator, etc., Appellant, v.
SAVINGS UNION BANK AND TRUST COMPANY
(a Corporation), Defendant; **STATE OF CALIFORNIA**, Respondent.

- [1] **STATUTORY CONSTRUCTION—TAKING OF PROPERTY BY STATE—PRESERVATION OF CONSTITUTIONAL RIGHTS.**—So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government.

- [2] **BANKS AND BANKING—UNCLAIMED DEPOSITS—ESCHEAT TO STATE—CONSTRUCTION OF STATUTES.**—Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act, as they were amended in 1915, which are correlative and which deal with bank deposits upon which, except for the accumulation of interest, neither deposits nor withdrawals have been made for a period of twenty years, are not to be given the construction that title to such money passes to the state absolutely on the expiration of twenty years, without compensation to the owner and without notice and hearing.
- [3] **ID.—JURISDICTION OF COURTS IN RELATION TO DEPOSIT.**—After the expiration of such period of twenty years, jurisdiction to make any order in relation to such dormant deposits is not exclusively in the superior court of Sacramento County. Until suit is brought by the attorney-general in Sacramento County, the court having jurisdiction of an action by anyone for property which another without right withholds is open to the depositor, as well after as before the expiration of such period.
- [4] **ID.—RIGHTS OF ATTORNEY-GENERAL ON INTERVENTION—POWER OF COURT TO DETERMINE OWNERSHIP.**—The right given the attorney-general, under section 1269a of the Code of Civil Procedure, to intervene in any action involving the right to property which has escheated or is about to escheat to the state, does not carry with it the right to delay the trial of such action, nor change the position of the parties. He must take the suit as he finds it, and, jurisdiction having attached in the court in which such action is pending, such court should determine the issue of the ownership of the property, notwithstanding that, since the commencement of that action, the statutory suit has been commenced by the attorney-general in Sacramento County to determine that question.
- [5] **STATUTORY CONSTRUCTION—GENERAL RULE.**—Not only must a statute be construed, if possible, to avoid unconstitutionality, but the construction must be consistent with sound sense and wise policy, and with a view to promoting justice.
- [6] **BANKING LAW—DEPOSITS UNCLAIMED FOR TWENTY YEARS—SUBSEQUENT ACTION BY ADMINISTRATOR—JUDGMENT.**—Where, after the expiration of the twenty-year period but prior to the bringing of the statutory suit by the attorney-general, the administrator of the estate of a deceased bank depositor brings suit against the bank to recover the deposit, with accrued interest, the plaintiff is entitled to judgment, notwithstanding the attorney-general intervenes and claims the money on behalf of the state.

2. Escheat of bank deposits, note, *Ann. Cas.* 1914B, 157.

Constitutionality of statutes relating to disposition of old bank deposits, note, 1 *A. L. R.* 1054.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Reversed.

The facts are stated in the opinion of the court.

Lovett K. Fraser, Herbert V. Keeling and Ornbaun & Fraser for Appellant.

U. S. Webb, Attorney-General, and Frank L. Guereña, Deputy Attorney-General, for Respondent.

BRITTAIN, J.—**This** appeal concerns the construction of sections 1269a and 1273 of the Code of Civil Procedure, and section 15 of the Bank Act, as they were amended in 1915. They relate to escheats of unclaimed bank deposits. The facts are admitted.

In 1868, William Anderson deposited with the Savings Loan Society Bank of San Francisco, the predecessor of the defendant, one thousand five hundred dollars, which with the accumulations of interest grew to \$12,525.12 by the 1st of January, 1917. Anderson died at his residence in Lake County in August, 1892. Under the provisions of section 15 of the Bank Act the defendant made report to the state treasurer that for twenty years prior to the first day of January, 1917, there had been neither deposit nor withdrawal of funds from the Anderson account and no claim had been made nor address of the owner of the account filed within the twenty-year period. On March 16, 1917, the public administrator of Lake County was granted letters of administration on the estate of Anderson, and on the day following he made demand upon the bank for payment of the deposit account, which being refused, the administrator sued the bank at its place of business in San Francisco. The attorney-general intervened on behalf of the state. The judgment was against the plaintiff and in terms declared the money on deposit had escheated on January 1, 1917, nearly nine months before the judgment was entered.

In this case there is no question of identity involved. The plaintiff as the administrator of the estate of the depositor stands in his shoes. His rights in regard to the money in question are neither greater nor less than those of the de-

positor. If, on December 31, 1916, either the depositor or the administrator of his estate had made demand on the bank, it was obligated to pay, because the money then on deposit rightfully belonged to the depositor or his estate. If payment had been refused, the superior court in San Francisco would have had jurisdiction of a suit against the bank, and upon the admitted facts its judgment must have been in favor of the depositor or his personal representative. Because the demand was not made until after January 1, 1917, the trial court determined, and the attorney-general here argues that the moneys escheated on that day, that the right of the depositor to the immediate payment no longer existed, and that this result flowed from the amendments of 1915.

[1] So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. The language of the statutes here in question requires no such interpretation.

[2] Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act are correlative. They deal with bank deposits upon which, except for the accumulation of interest, neither deposits nor withdrawals have been made for a period of twenty years. The Bank Act provides that the moneys in such deposits "which shall have remained unclaimed for more than twenty years . . . and where neither the depositor nor any claimant has filed any notice with such bank showing his or her present residence, shall . . . be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure." (Stats. 1915, p. 1106.) The general language of the code section is the same, except that the last phrase reads, "shall . . . escheat to the state." (Code Civ. Proc., sec. 1273.) The section then provides that when the attorney-general shall learn of such deposits, he shall bring suit in the superior court in Sacramento County, and that upon the trial, "if it be determined that the moneys . . . are unclaimed as hereinabove stated, then the court must render judgment in favor of the

state declaring that said moneys have escheated," and commanding the bank to deposit the money with the state treasurer thereafter to be dealt with as other escheated property.

So careful is the state of the rights of its citizens that even after the adjudication, for a period of five years, any person not a party or a privy to the escheat judgment may sue the state to recover the money, and this time is extended to infants and persons of unsound mind for a period of one year after the removal of the disability. (Code Civ. Proc., sec. 1272.)

In the suit commenced by the attorney-general any claimant may appear and present his claim of ownership. (Code Civ. Proc., sec. 1273.) The attorney-general argues that the only adverse claim which could prevail in the suit would be one based on the nonexistence of the very fact on which the suit is based, namely, that no claim had been made within the twenty years of dormancy. If this construction should be adopted, how unreliable would be the guaranty of justice contained in section 15 of the Bank Act, which provides that "any person interested may appear in such action and become a party thereto," and that "the court shall have full and complete jurisdiction over the state, and the said deposits and of the person of everyone having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon." This language is most appropriate to provide for a real trial of the claim of interest or ownership, and it is equally inappropriate to provide for a merely formal adjudication of the jurisdictional fact of nondemand for a period of twenty years. Just as the statute provides for a claim of ownership after the judgment, so does it provide for a claim of ownership after the attorney-general sues and before the judgment. Of course, a claim may be made by the owner against the bank at any time before the expiration of the twenty years. There necessarily must elapse a period of time between the expiration of the twenty years and the commencement of the state's suit. What are the rights of the owner of the money during that intermission?

[3] The attorney-general argues that after the expiration of the twenty years no court save that in Sacramento County has jurisdiction to make any order in relation to the deposit.

The Bank Act provides that when summons is issued under section 1273 of the Code of Civil Procedure the clerk shall also issue a special notice directed to all persons, requiring them to appear within sixty days after the first publication of summons to show cause why the money should not be paid to the state treasurer. This notice must be published with the summons, that is, for a period not less than four weeks. (Code Civ. Proc., sec. 1273.) Under the Bank Act it is not until the completion of publication that jurisdiction vests in the Sacramento court. The duties of the attorney-general are many, the demands upon his office are great. There may be most cogent reasons for delay in the bringing of suits of this nature. The suit in Sacramento concerning this deposit was not commenced until July 30, 1917, seven months after the expiration of the twenty-year period.

Suppose the depositor had not died, but returning from a far country had been delayed by stress of weather, so that a demand which would have been honored on December 31st could not be presented until January 2d; suppose, further, that he was in sickness, that his family was in distress, or that the fund he had thriftily laid by against the day of his dire need alone would save him from the bankruptcy court; and, suppose the bank should pay him what rightfully was his, is it conceivable that the court in Sacramento would require the bank again to pay the amount of the deposit to the state? If the bank should refuse to pay upon such a demand, as it did in this case, would the admitted owner of the deposit be compelled to wait until the attorney-general should find time or be willing to open the door of the Sacramento court so that he might as a defendant present his claim? Under such a rule he might be driven into bankruptcy, and he and his family become public charges. It would be no answer to say he might by the roundabout method of *mandamus* force the attorney-general to throw open the door of the Sacramento court. The rule that justice shall not be denied is no more sacred than is that which declares it shall not be delayed. Until suit is brought by the attorney-general in Sacramento County, the court having jurisdiction of an action by anyone for property which another without right withholds is open to the depositor, as well after as before the expiration of the twenty-year period. In the exercise of its constitutional jurisdiction (Const., art. VI,

sec. 5) the superior court in San Francisco had power to entertain the suit of the plaintiff, and its jurisdiction having attached, it necessarily had power to determine the substantial rights of the parties before it. (*Hibernia etc. Soc. v. Lewis*, 117 Cal. 577, [47 Pac. 602, 49 Pac. 714]; *Peck v. Jenness*, 7 How. 612, 624, [12 L. Ed. 841, see, also, Rose's U. S. Notes].)

[4] In the present case, in view of the fact that the enactments of 1915 had received no judicial interpretation, the bank refused to pay, and upon suit being brought submitted itself to the judgment of the court. Under the provisions of 1269a of the Code of Civil Procedure, the attorney-general intervened in this action. That section was adopted at the same session of the legislature at which the amendments under discussion were adopted, and no doubt to protect the interests of the state in the contingency of a claim being made in the interim which must elapse in every instance between the report of the bank and the commencement of the suit in Sacramento County. It provides that whenever the attorney-general is informed that property has escheated or is about to escheat, he may commence an action on behalf of the state to determine its rights to the property, "or may intervene on its behalf in any action . . . and contest the rights of any claimant or claimants thereto." The statute does not say that upon his intervention the court in which the action is brought shall be divested of its jurisdiction pending the bringing and determination of another suit. There is no suggestion that any different rules of law shall apply to an intervention under this section of the code than those which ordinarily control in such cases. It has been broadly stated that the intervener must take the suit as he finds it. A better statement is that the intervention must not retard the principal suit, nor delay the trial of the action, nor change the position of the parties. (*Hibernia etc. Soc. v. Churchill*, 128 Cal. 634, [79 Am. St. Rep. 73, 61 Pac. 278]; *Van Gorden v. Ormsby*, 55 Iowa, 664, [8 N. W. 625]; *Boyd v. Heine*, 41 La. Ann. 393, [6 South. 714]; *Mayer v. Stahr*, 35 La. Ann. 57; *Ragland v. Wisrock*, 61 Tex. 391; *Cahn v. Ford*, 42 La. Ann. 965, [8 South. 477].) The fact found by the court that after the commencement of this action the statutory suit was commenced by the attorney-general in Sacramento County had no bearing upon the de-

termination of this case. Jurisdiction having attached, the court should have determined the issue of ownership of the money. (*Dunphy v. Belden*, 57 Cal. 427; *Sharon v. Sharon*, 84 Cal. 424, [23 Pac. 1100].)

What has already been said concerning the question of jurisdiction applies equally to the substantial rights of the parties. A construction of section 1273 of the Code of Civil Procedure and section 15 of the Bank Act, by which title to money on deposit would pass to the state absolutely on the expiration of twenty years, without compensation to the owner and without notice and hearing before his property should be taken, would be intolerable. [5] Not only must a statute be construed, if possible, to avoid unconstitutionality, but the construction must be consistent with sound sense and wise policy, and with a view of promoting justice. (*San Joaquin etc. Inv. Co. v. Stevinson*, 164 Cal. 229, [128 Pac. 924]; *In re Mitchell*, 120 Cal. 386, [52 Pac. 799]; *Merced Bank v. Casaccia*, 103 Cal. 645, [37 Pac. 648].)

[6] In the present case the identity and death of the depositor are admitted and the appellant is the administrator of his estate. As the personal representative of the depositor he was entitled to payment of the deposit at any time the admitted facts were established. (Code Civ. Proc., secs. 1552, 1726, 1732.) The facts were established by the findings in this action to which the state was a party. Upon the facts found the plaintiff was entitled to judgment. This conclusion is in consonance with the reasons underlying the decision of the supreme court in the somewhat similar case of *People v. Roach*, 76 Cal. 297, [18 Pac. 407].

The judgment is reversed.

Langdon, P. J., and Haven, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 23, 1919.

All the Justices concurred, except Wilbur, J.

[Civ. No. 2391. First Appellate District, Division Two.—August 27, 1919.]

HARRY CLYDE DRAKE, Appellant, v. CHARLES L. TUCKER et al., Respondents.

- [1] **WATERS AND WATER RIGHTS—RUNNING WATER—RIPARIAN RIGHTS.** Riparian rights do not mean ownership in any special portion of the water of a stream until such water is actually taken and used. In running water there can be no absolute ownership.
- [2] **ID.—DEED—RIPARIAN LAND—RESERVATION OF WATER—CONSTRUCTION OF.**—Under a deed reserving to the grantors the amount of water “held, used and claimed” by the former owner of the property, such grantors are entitled to only such amounts of water as were used by such former owner, the rights in the remainder of the water, in the absence of other priorities, being governed by the law applicable to riparian owners.
- [3] **ID.—USE OF WATER BY RIPARIAN OWNERS—RIGHT TO IRRIGATE.**—A riparian owner may use the whole of the stream if it is necessary to satisfy his natural wants, and may consume all the water for his domestic purposes, including water for his stock, but if he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not furnish more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufacture.
- [4] **ID.—WHEN RIPARIAN OWNER ENTITLED TO WATER—RIGHT TO DIVERT ON LAND OF UPPER OWNER.**—A riparian proprietor is entitled only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to defendant’s land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper proprietor and divert the water from there.
- [5] **ID.—DIVISION OF WATER IN PROPORTION TO ACREAGE—PROPER JUDGMENT.**—As between the parties to the action, a judgment

3. Riparian owner’s right to use and detain water and to the natural flow of the stream, note, 79 AM. DEC. 638.

Meaning of phrase “domestic purposes” in relation to riparian rights, notes, ANN. CAS. 1912B, 621; ANN. CAS. 1914D, 563.

Nature of riparian rights and lands to which they attach, notes, 9 ANN. CAS. 1235; ANN. CAS. 1913E, 709; ANN. CAS. 1917C, 1026.

Correlative rights of upper and lower riparian proprietors generally, note, 41 L. R. A. 737.

dividing the balance of the water, after the natural wants of the parties are satisfied, between them for irrigation purposes in the proportion that the acreage of each bears to the entire acreage of their riparian lands, is proper and reasonable.

- [6] EVIDENCE—CONSTRUCTION OF WRITTEN INSTRUMENTS—ADMISSIBILITY OF PAROL TESTIMONY.—When written instruments are not ambiguous, they may not be varied by parol testimony; and even though, during the course of the trial, the court considers certain instruments ambiguous, it does not commit error in refusing to allow the introduction of evidence of the negotiations and understandings of the parties thereto at the time they were executed where, in arriving at its judgment, it does not treat the instruments as ambiguous, but construes them correctly without the aid of parol evidence.

APPEAL from a judgment of the Superior Court of Napa County. A. B. McKenzie, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Clarence N. Riggins for Appellant.

John T. York and Percy S. King for Respondents.

LANGDON, P. J.—This is an appeal by the plaintiff from a judgment of the superior court in and for Napa County, dividing the waters of Ritchie Creek between the plaintiff and the defendants. The principal question presented to this court is as to the construction of certain deeds in the record. The facts surrounding the execution of said deeds are briefly as follows: From 1867 to 1905 George W. Tucker, the father of the defendant Charles L. Tucker, owned 146 acres of land situated along Ritchie Creek, a map of which land is in evidence in this action. During a part of this time he sold about three thousand gallons per day of the water of said creek to the county, and in addition used what he required thereof for domestic purposes in and about his house and barn. In 1905 he deeded his property to his children, who held it as tenants in common. One of the children died shortly thereafter, and the remaining children partitioned the land among themselves by two deeds, which it is conceded were executed as a part of the same transaction, and which deeds are the key to the solution of the controversy here. In the first deed from Charles L. Tucker, one of the respondents here, and George H. Tucker, to their sisters, Lila J. Eachus and Martha

A. Culver, a portion of the land was conveyed, which has since by mesne conveyances become the property of the plaintiff. This land is higher on the stream than the defendants' land. The deed conveying it contains a clause granting to plaintiff's predecessors the right to the amount of water diverted by George W. Tucker at a point in Ritchie Creek specified therein. At the same time another deed was executed by Eachus, Culver, and George H. Tucker to Charles L. Tucker, respondent, conveying an undivided three-quarter interest in the portion of the land now owned by defendant and containing a clause granting to said Charles L. Tucker the right to divert water from a point specified and situated upon the land now held by the plaintiff, after the amount formerly diverted by George W. Tucker had been reserved. Defendant has maintained this point of diversion up to the time of the action. Plaintiff has resided on his land for about four years and has diverted water from a point below defendant's said point of diversion until May, 1917, when plaintiff placed a five-inch pipe in the stream above defendant's point of diversion and diverted substantially all the water of the stream, so that the defendant was deprived of water necessary for domestic and irrigation purposes. Defendant removed the pipe-line of plaintiff so placed, and plaintiff sought an injunction.

The clauses in the deeds upon which plaintiff and appellant bases his claim were construed by the trial court in a manner which is in accordance with our own conclusions. Defendant contends that as a riparian owner, he is entitled to his proportion of the water except as that right is modified by the deeds. The first deed in which Charles L. and George H. Tucker are the grantors and Lila J. Eachus and Martha A. Culver, plaintiff's predecessors in title, are the grantees, conveys: "All of the water right acquired, or the right to divert the waters of Ritchie creek acquired by George Tucker, the grantor of all the parties to this instrument, at any time in connection with the above described tract, or in connection with any other tract of which the foregoing tract was a part and which said water is now diverted at a point in Ritchie creek southwest of the most southerly point of the above described land."

The second deed in which Lila J. Eachus, Martha C. Culver, and George H. Tucker are grantors and Charles L.

Tucker, the defendant, is the grantee, contains the following language: "Granting to the said Charles L. Tucker the right to divert water from Ritchie creek at a point about four hundred and fifty feet southwest of the main county road, and below the point where F. Salmina & Co. now divert water from said creek; it being understood and agreed that Charles L. Tucker shall only have the right and privilege of using and diverting the overflow from Ritchie creek after Lila J. Eachus and Martha A. Culver, or either of them, have used all of the water formerly held, used or claimed by George Tucker, the former owner of the 146 acre tract this day divided among the parties hereto, they may desire for any and all purposes, upon the land this day deeded to them, and after said F. Salmina & Co. has used its share of said water; and it is understood and agreed that no right, title or interest in any water right of said George Tucker, or any water right acquired since said property was granted to the parties hereto is hereby granted." This deed reserves to the grantors only the amount of water formerly "held, used, or claimed" by George Tucker. The court admitted evidence of the amount of water used by George Tucker, and found that the amount was about three thousand gallons per day sold to the county, and sufficient water for his domestic uses about his home and barn, and the court therefore allowed the plaintiff such amounts before allowing the defendant any water at all, and after such amounts were taken by the plaintiff, if any water remained, the court allowed the defendant sufficient water for his domestic uses and divided the balance, if any, between the plaintiff and defendant for irrigation in the proportion that the acreage of each bore to the entire acreage of the riparian land. [1] The decisions are to the effect that in running water there can be no absolute ownership; that riparian rights do not mean ownership in any special portion of the water of a stream until such water is actually taken and used. (*Kidd v. Laird*, 15 Cal. 161, 179, [76 Am. Dec. 472]; *Eddy v. Simpson*, 3 Cal. 249, 252, [58 Am. Dec. 408]; *Palmer v. Railroad Com.*, 167 Cal. 163, 168, [138 Pac. 997]; 2 *Farnham on Waters and Water Rights*, pp. 1565, 1566.) [2] In view of these decisions, the language of the deed is clear. George W. Tucker "held, used, and claimed" only the portion of the water actually taken and used by him, which amount was found by the court upon substantial

evidence. The deed from Charles L. Tucker by which appellant claims the grantor deeded away his riparian rights must be construed in connection with the deed to him, as both are admittedly a part of the same transaction. We think the language of that deed bears out the construction placed upon it by the court. The deed contains a specification of the exact water conveyed by it in the words: "And which said water is now diverted at a point in Ritchie creek southwest of the most southerly point of the above described land." The evidence regarding the amount of water diverted at that point at the time the deeds were executed is in harmony with the judgment.

As the deeds merely reserved to the plaintiff's predecessors such amounts of water as the court found were used by George Tucker—the rights in the remainder of the water of the creek, as between the plaintiff and the defendant, are governed by the law applicable to riparian owners. [3] In answer to appellant's contention that he is entitled to use the water for irrigation on his land before the defendant is entitled to any water at all for domestic or other uses, we quote the language found in the decision in the case of *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 230, [20 Am. St. Rep. 217, 224, 24 Pac. 645, 647]: "So far, the right of a riparian proprietor to the use of the water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though perhaps not the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected, the right to a reasonable use of the surplus water by the riparian proprietor in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication." (See, also, *Smith v. Corbit*, 116 Cal. 587, [48 Pac. 725]; *Learned v. Tangeman et al.*, 65 Cal. 334, [4 Pac. 191].) What is a reasonable use depends upon all the facts and circumstances of the case. (*Ferrea v. Knipe*, 28 Cal. 341, [87 Am. Dec. 128]; *Union Mills etc. Co. v. Ferris*, 2 Sawy. 176, [Fed. Cas. No. 14,371];

Dilling v. Murray, 6 Ind. 324, [63 Am. Dec. 385]; *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191, at pp. 193, 194, [57 Am. Dec. 85]; *Timm v. Bear*, 29 Wis. 254, 265.) The court here heard evidence upon the needs of the parties, the nature of the land, the volume of the stream and its variation in this respect at different seasons, and we think properly decided that it would be an unreasonable use of the water under all the facts and circumstances for the plaintiff to use it for irrigation before the domestic uses of the defendant had been satisfied. The court, therefore, after reserving to the plaintiff the amount reserved to him by the deeds, allowed him water for his domestic uses and then allowed to the defendant water for his domestic uses before allowing the plaintiff any water for irrigation. After the domestic uses of the defendant were satisfied, then the water was divided between the plaintiff and defendant for irrigation, having regard to the number of acres of riparian land owned by each. The case seems to fall within the rule announced in the case of *Evans v. Merriweather*, 3 Scam. (Ill.) 492, [38 Am. Dec. 106], where it is said that a riparian owner may use the whole of the stream if it is necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock, but if he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not furnish more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufacture.

[4] It is not contended that the land of the defendant is nonriparian land. As a riparian proprietor, he is entitled, it is true, only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to defendant's land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper proprietor and divert the water from there. (*Anaheim Union Water Co. v. Fuller*, 150 Cal., at p. 332. [11 L. R. A. (N. E.) 1062, 88 Pac. 978].) A riparian proprietor's title to the water begins only when it reaches his land. (*Hargrave v. Cook*, 108 Cal. 72, [30 L. R. A. 390,

41 Pac. 18].) But in the present case, defendant does not rely upon his riparian right for the privilege of going upon plaintiff's land and diverting the water. The deed to him from plaintiff's predecessor in interest has facilitated the enjoyment of his riparian rights, and by virtue of the contract between the parties, as contained in said deed, defendant is given the right to divert water from Ritchie Creek at a certain point on plaintiff's land, after plaintiff has used for any purpose he may desire the amount of water "held, used, or claimed by George Tucker," the former owner, which amount has been found by the court and saved to the plaintiff.

[5] With respect to the fractional division of the water for purposes of irrigation, there is no evidence before the court as to whether or not there are yet other lower riparian owners, but if there are, of course, the rights of such owners are not affected by this judgment. As between the parties hereto, the division seems to us proper and reasonable, and if there are other parties who have yet independent rights, in a proper proceeding the rights of the riparian proprietors now before the court may be declared to be subject to such rights of such third parties, but such adjudication would not change the relative rights of the parties hereto as between each other.

Appellant objects to the holding of the trial court that certain land which was owned by the plaintiff but was divided from his main tract and from Ritchie Creek by a strip of land used for the operation of an electric railroad was nonriparian land. The fee to the strip of land occupied by the railroad had been granted to said company by plaintiff's predecessor in title. It becomes unnecessary for us to pass upon this question of law, because, as pointed out by the respondent, this ruling was not injurious to the plaintiff, for the reason that the court held that the land of both the plaintiff and defendant lying north of said railroad was nonriparian, and, as shown by the map, more of the defendant's land was thus held to be nonriparian than of the plaintiff. As the water was divided in proportion to the acreage of riparian land held by each, after reserving certain amounts to the plaintiff, the plaintiff would have received less water had the court held this strip of land to be riparian.

Appellant objects that he was not allowed to introduce evidence of the negotiations and understandings of the parties

to the deeds at the time they were executed. [6] The rule is, of course, beyond dispute that when written instruments are not ambiguous, they may not be varied by parol testimony. The plaintiff himself admits that he does not consider these instruments ambiguous, but relies upon certain language used by the court in the course of the trial which he contends shows that the court considered these instruments ambiguous. The answer to this contention is that in arriving at its judgment, the court did not treat the instruments as ambiguous, but construed them without the aid of parol evidence, and this court finds that construction to be correct. It cannot be held, therefore, that these instruments are ambiguous, requiring the aid of parol testimony for their interpretation.

The judgment is affirmed.

Haven, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 23, 1919.

All the Justices concurred.

[Crim. No. 852. First Appellate District, Division One.—August 27, 1919.]

THE PEOPLE, Respondent, v. A. W. WILLIAMS,
Appellant.

- [1] CRIMINAL LAW—ORDER DENYING MOTION IN ARREST OF JUDGMENT —APPEAL.—An appeal does not lie from an order denying a motion in arrest of judgment.
- [2] ID.—LARCENY — IMPEACHMENT OF COMPLAINING WITNESS — CONFLICTING STATEMENTS—PROPER QUESTION.—In a prosecution for the crime of larceny, the complaining witness, on direct examination, having testified that when the defendant returned to the room in question he asked the defendant to switch on the light, and on cross-examination having been asked if it was not a fact that when the defendant entered the room he switched on the light without being asked by the witness so to do, and the

latter having answered in the negative, he was then properly asked, "Did you state at the preliminary that you asked him to turn on the light?"

[3] **ID.—PREVIOUS INCONSISTENT STATEMENTS BY COMPLAINING WITNESS—CROSS-EXAMINATION—IMPEACHMENT—FOUNDATION UNNECESSARY.**—In a prosecution for the crime of larceny, the complaining witness having testified on cross-examination that he made no effort to hold the defendant a prisoner in his room after the discovery of the theft, it was proper to ascertain whether or not the witness had made previous inconsistent statements, not only upon that subject, but also relative to the events that occurred in his room and partially detailed upon his direct examination. And it was proper to endeavor to discover that fact from the witness himself, without the necessity of first laying the predicate referred to in section 2052 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. J. Rogers and F. M. Fulstone for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, and R. L. Chamberlain for Respondent.

BARDIN, J., pro tem.—The defendant was informed against for the crime of grand larceny. Upon his trial he was convicted of petit larceny and, having suffered a previous conviction of felony, which he confessed on arraignment, was sentenced to imprisonment in the state prison at San Quentin. He now appeals from the judgment of conviction and an order denying his motion for a new trial, and also from an order denying his motion in arrest of judgment.

[1] It will be unnecessary to comment further upon the attempted appeal from the order denying defendant's motion in arrest of judgment than to say that there is no authority for such appeal. (*People v. Matuszewski*, 138 Cal. 533, [71 Pac. 701]; *People v. Mullen*, 7 Cal. App. 547, [94 Pac. 867].)

No claim is made by the defendant that the verdict of the jury is not supported by the evidence, the grounds urged for the reversal of the judgment and order denying a new trial

being that the trial court erred in its rulings upon the admissibility of evidence upon three separate occasions, thereby committing error of such substantial weight as to entitle the defendant to a reversal of the judgment rendered against him, and to have this cause remanded for a new trial.

The information alleges that the crime was committed on or about January 2, 1919. The errors complained of arose during the cross-examination of the complaining witness, Walker, who testified substantially as follows: That he became acquainted with the defendant about the middle of December, 1918, while both were in the employ of Wells-Fargo & Co. at Fresno, California. That about the first day of January, 1919, Walker stated to the defendant that he was making arrangements to go to Texas and intended going to the bank to withdraw some money. That shortly prior to the alleged theft defendant heard a third party state to Walker that he would pay him some money the following day, and that on January 2d, the day of the commission of the offense, the defendant inquired whether this money had been paid, to which inquiry, however, the prosecuting witness answered in the negative. Walker further testified that on the afternoon and evening of January 2d, the prosecuting witness and the defendant drank intoxicating liquors together, but were not intoxicated, and that night went to Walker's room in the Clark hotel to pass the night, although at that time the defendant had lodgings at another hotel.

The testimony of Walker further shows that shortly after reaching the latter's room they retired for the night, both occupying the same bed; that when Walker disrobed he felt in his trousers pocket and ascertained that his pocketbook was there, folded his trousers, and left them on a suitcase near the head of his bed. At 5 o'clock that afternoon his pocketbook contained a fifty dollar Liberty bond, a twenty dollar bill, and a five dollar bill in currency of the United States, after which time its contents had not been disturbed.

Before retiring Walker locked the door of the bedroom, placed the key on the table, directing the defendant's attention to the fact should he desire to go to the lavatory. Walker was awakened at five minutes to 2 o'clock A. M. of that night by the defendant unlocking the door from

outside of the room. Williams stepped inside the room and stated that he had been to the toilet, which was but two or three doors away and in the same hallway. He was fully dressed at the time. Walker then noticed that his trousers had been disarranged and had been moved from the suitcase, and he thereupon discovered that his pocket-book and its contents were gone.

Walker further testified that he and the defendant remained in the room during the balance of the night, the defendant undressing and again retiring, while he, Walker, did not again retire. Shortly before 7 o'clock of the morning of January 3d, one Keith, a fellow-roomer at the Clark hotel, came to Walker's room and was informed of the larceny of Walker's property. Keith stated to Williams that he had seen him down on H Street a little after 12 o'clock, which Williams then admitted was true.

[2] It was testified by Walker, on direct examination, that when the defendant returned to the room about 2 o'clock A. M., under the circumstances already related, he was asked by Walker to switch on the light. On cross-examination the question was asked if it was not the fact that when the defendant entered the room at the time referred to he switched on the light without being asked by the witness so to do, to which question the witness answered in the negative. This question then followed: "Did you state at the preliminary that you asked him to turn on the light?" The district attorney objected to the question as immaterial. The question was a proper one and the objection should have been overruled. (*People v. Hart*, 153 Cal. 261, [94 Pac. 1042]; *People v. Webber*, 26 Cal. App. 413, [147 Pac. 102].) And it must be assumed that such ruling would have immediately followed had not counsel for the defendant been apparently diverted from his purpose of making the above inquiry, for, instead of taking the ruling of the court upon the objection, he asked another and different question of the witness before the court had ruled upon the objection, thus in effect withdrawing the previous question.

During the direct examination of the prosecuting witness this testimony was given:

"Q. Was there anything said about where he would stay all night that night? (Referring to the night in question.)

"A. Oh, I told him that—he had stayed there the night before—I told him, I says: 'I can't keep you over to-night; I says, 'I'm going to have company.' "

Referring to this testimony, counsel for the defendant, on cross-examination, propounded the question which follows, which question was objected to as immaterial and the objection properly sustained:

"Now, just tell us who that party was and give us an opportunity to subpoena them right now."

The truth or falsity of that statement would shed no light upon the issues before the court. In fact, if the statement was a pure fabrication, then it would seem to militate more against the defendant than be of benefit to him, for it would, to some extent, demonstrate the desire in the prosecuting witness' mind to rid himself of the company of the defendant.

We pass now to the consideration of the last objection complained of. This objection is predicated upon the court's refusal to permit the prosecuting witness to answer another of the questions directed to the prosecuting witness on cross-examination. That witness had testified that he had made no effort to make the defendant a prisoner in his room prior to the arrival of the peace officers. These proceedings then took place:

"Q. Is it not a fact that you told Mr. Beebe, the proprietor of the Mayer Hotel, where Mr. Williams stopped, a few days after the 2d, that you found this man in your room and that you held him at the end of a gun in the corner of the room until the police came?

"Mr. Beaumont: Well, we object to that as irrelevant, incompetent, and immaterial and not proper cross-examination, and an attempt to impeach the witness on a collateral and immaterial matter; and that the question is not properly founded for impeachment.

"The Court: The objection is sustained. I think it is immaterial.

"Mr. Rogers: If we call Mr. Beebe, will we be prevented from asking whether or not Mr. Walker made this statement to him, that he found him in the room and held him at the end of a gun until the police came?

"The Court: The chances are you will, if it is objected to."

Mr. Beebe was subsequently called as a witness for the defendant and testified that the statement above referred to was in fact made by the prosecuting witness, but his testimony was, upon motion of the district attorney, stricken from the record, although the jury was not admonished to disregard it.

[3] The record discloses that during the direct examination of the prosecuting witness he went into a detailed account of what happened in his room from the time the defendant returned there until morning, and during which time the defendant and the prosecuting witness were together alone. It was proper to make full inquiry upon cross-examination as to any facts which had been referred to in the direct examination. (Code Civ. Proc., sec. 2048.) And, having testified on cross-examination that he made no effort to hold the defendant a prisoner under the circumstances referred to, it was proper to ascertain whether or not the witness had made previous inconsistent statements, not only upon that subject, but also relative to the events that occurred in the room and partially detailed upon his direct examination. And it was proper to endeavor to discover that fact from the witness himself, and without the necessity of first laying the predicate referred to in section 2052 of the Code of Civil Procedure. (*People v. Jones*, 160 Cal. 358, [117 Pac. 176]; *People v. Ho Kim You*, 24 Cal. App. 451, [141 Pac. 950]; *People v. Webber*, 26 Cal. App. 413, [147 Pac. 102]; Wigmore on Evidence, sec. 1023.)

The court did not commit error in striking out the testimony of Mr. Beebe, the witness called for impeachment. It was received over the objection of the district attorney and was not properly founded for impeachment as required by section 2052 of the Code of Civil Procedure. But the trial court was in error in sustaining the objection of the district attorney to the question directed to the complaining witness relative to the alleged contradictory statement made to Mr. Beebe. The utmost latitude compatible with our rules of evidence should have been permitted in the cross-examination of that witness. The record shows other instances where the cross-examination was held within boundaries more restricted than is usual under circumstances where the guilt of the defendant depends to a considerable

extent, not only upon indirect evidence, but also upon the credibility of a single witness.

A survey of the whole record of the case, however, which discloses ample testimony to warrant the conviction of the defendant, compels the conclusion that the error complained of has not resulted in a miscarriage of justice. The case seems to be one for the application of section 41½ of article VI of the constitution of this state. It appears from the record that the defendant had been unduly inquisitive about the receipt of money by the complaining witness shortly before the commission of the offense. On the night of January 2d he had pressed himself into companionship with Walker for the night, although he had lodgings at another hotel. Without arousing Walker from his slumber the defendant stealthily arose at about midnight, fully dressed himself, and went down upon the streets of Fresno, and was observed by two witnesses in front of the hotel where he had permanent lodgings. He returned to the room of the prosecuting witness, unlocked the door from the outside, entered, locked the door again, and stated to Walker that he had been to the toilet. Subsequently, and in the presence of the officers, he admitted having made this false statement to Walker. Confronted with a witness who had seen him down on the street, he offered in explanation of such act that he had gone from Walker's room down upon the street to get a drink. He denied having any money in his possession other than fifteen dollars in currency and a few dollars in silver. It was only after a very careful search that a twenty dollar bill in currency was found concealed on the inside of his hatband. The Liberty bond was not found.

The defendant did not take the stand, but sought to prove by other witnesses that Walker had been imbibing intoxicating liquors quite freely on the afternoon and evening in question and that he had been consorting with a woman of questionable morals, and that he might have lost his money through her handiwork, rather than by any act of the defendant. The testimony intended to sustain such a theory, while redolent of days before the advent of the Red-light Abatement Act and of war-time prohibition, is weak and unconvincing, and in our estimate is entitled to

no more weight than that given it by the jury and trial court.

The defendant's conduct, his admissions, his highly incriminatory deceptions, coupled with the testimony of the witnesses for the prosecution, justify the conclusion reached by the jury, and make this a proper place to apply the section of the constitution referred to.

The judgment and order denying a new trial are affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2951. First Appellate District, Division One.—August 28, 1919.]

T. W. DUPES, Respondent, v. EUGENIA N. DUPES, Appellant.

- [1] **DIVORCE—VIOLATION OF COURT ORDER BY WIFE—DISMISSAL OF APPEAL.**—An appeal by the wife from a judgment granting the husband a divorce and awarding him the custody of the minor children will not be dismissed because of the violation by the wife of the terms of an order of the trial court regarding the custody of such children.
- [2] **ID.—FINDINGS — EVIDENCE — CORROBORATION.**—In this action for divorce, the findings of the trial court were responsive to the pleadings and were sufficiently supported by substantial evidence and, where necessary, were corroborated as required by section 130 of the Civil Code, and the trial judge was fully warranted in his view of the merits of the case.
- [3] **ID.—EXTREME CRUELTY — WHAT CONSTITUTES — CONCLUSION OF TRIAL COURT—APPEAL.**—The question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal.
- [4] **ID.—ABSENCE OF ONE SPOUSE WITHOUT KNOWLEDGE OR CONSENT OF OTHER.**—Whether or not any specific absence of one spouse

3. Cruelty without violence as ground for divorce, note, 65 Am. St. Rep. 75.

Habits or course of conduct of spouse as cruelty warranting divorce, note, Ann. Cas. 1918B, 480, 500.

from the family home without the knowledge or consent of the other constitutes extreme cruelty, depends entirely upon the facts and circumstances of each particular case.

[5] **ID.—EXTREME CRUELTY IS QUESTION OF FACT.**—Whether or not any particular acts or course of conduct constitutes extreme cruelty within the meaning of the law is a question of fact to be deduced from all the circumstances of each case.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge. Affirmed.

The facts are stated in the opinion of the court.

MacKnight & Fitzgerald and P. N. Myers for Appellant.

E. J. Emmons, Chas. N. Sears and T. C. Gould for Respondent.

BARDIN, J., pro tem.—The plaintiff instituted an action against the defendant for divorce upon the ground of extreme cruelty. The defendant denied the allegations of cruelty and cross-complained against plaintiff, seeking a decree of divorce upon the grounds of extreme cruelty, habitual intemperance, and willful neglect. Judgment was for the plaintiff and he was awarded the custody of the two minor children of the parties.

Two proceedings have already been disposed of by the higher courts of the state involving the custody of these children. (*In re Dupes*, 31 Cal. App. 698, [161 Pac. 276]; *Dupes v. Superior Court*, 176 Cal. 440, [168 Pac. 888].)

Before taking up the consideration of this appeal from the judgment of the lower court upon its merits, it will first be proper to dispose of a motion to dismiss the present appeal because of the claim of respondent that appellant has so interfered with the custody of said children, since taking the appeal, that she has placed herself in contempt of the order of the superior court of the county of Kern, sitting as a juvenile court, and ought not therefore be permitted to press her appeal to a conclusion upon its merits.

[1] A number of reasons are urged for the dismissal of the appeal, but the only one meriting the particular attention of this court relates to alleged willful and contumacious conduct on the part of the appellant with reference to the custody of the children of the parties to this action.

Briefly, the facts, stated in form of affidavit, surrounding such alleged misconduct of the appellant, which, since they are not denied, may, for the purpose of this discussion, be assumed to be true, are these: Very shortly after the decision in *Re Dupes, supra*, the juvenile court of Kern County, by its order, caused these unfortunate children to be placed in the custody of the Children's Shelter of the city of Bakersfield, C. P. Badger, truant officer of that county, having direct charge of them, pending the hearing of a petition placed before it to have them declared wards of that court. Leave was given the appellant by the judge of the juvenile court to visit the children on January 17, 1918, but, in violation of the terms of that permission and in contempt of the order of said juvenile court, the appellant took possession of said children and shortly thereafter removed them, it is believed, from the jurisdiction of the state of California, as the whereabouts of defendant and of the two children has ever since been unknown to plaintiff and to said court, although plaintiff has expended a large amount of money and has been very diligent in endeavoring to ascertain their whereabouts.

The point made for the dismissal of the appeal is not different in principle from that urged for the dismissal of three appeals in the case of *Vosburg v. Vosburg*, 131 Cal. 628, [63 Pac. 1009], and on the authority of that case the motion to dismiss the appeal must be denied.

Not only are we guided to this end by the sound logic of that particular case, but also by the analogous case of *Johnson v. Superior Court*, 63 Cal. 578. And we may here add that consideration for the welfare of the minors and of their probable ultimate disposition, as well also the interest the state has in the maintenance of the marital state, require that appeals involving the merits of such actions should not be dismissed except upon clear authority so to do.

In *Deyoe v. Superior Court*, 140 Cal. 476, [98 Am. St. Rep. 73, 74 Pac. 28], Mr. Justice Angellotti, speaking for the court, said: "While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by

eminent writers upon the subject that such an action is really a triangular proceeding in which the husband and the wife and the state are parties."

And in *McBlain v. McBlain*, 77 Cal. 507, [20 Pac. 61], it is stated that: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters."

The cases cited in support of the motion to dismiss the appeal are from other jurisdictions, and are directed to the contumacious conduct of the husband relative to the payment of money for the prosecution of the wife's cause of action, or for alimony, or such kindred matters. As stated in the note to the case of *Brown v. Brown*, 22 Wyo. 316, [140 Pac. 829], in 51 L. R. A. (N. S.) 1119: "Some of the courts lay down the rule that the proper remedy for failure to comply with an order of the trial court for the payment of counsel fees, etc., is by dismissal of the appeal or suspension of final judgment." (Citing cases.)

But other courts have adopted rules analogous to and in support of the principle stated in *Vosburg v. Vosburg*, *supra*. (*Eastes v. Eastes*, 79 Ind. 363; *Dwelly v. Dwelly*, 46 Me. 377.)

Numerous charges of misconduct on the part of the wife are made in plaintiff's complaint, but the principal allegations thereof relate to defendant's departure from the home of plaintiff and defendant with one of their children of very tender years, under peculiar and unwarranted circumstances, the plaintiff not being advised as to her whereabouts or that of the child until her return to Bakersfield after an absence of over four months; and that shortly after her return she suffered a miscarriage by reason of her own willful act, being actuated by the desire to conceal from plaintiff her sinful and adulterous conduct while away from him. The plaintiff also alleged in his complaint that the defendant permitted plaintiff's mother-in-law to exercise an immoral influence and control over her, subverting her morals, undermining her character, and causing her to pursue a course of apparent illicit intimacy with other men.

[2] It will serve no useful purpose to go into a detailed survey of the evidence produced to substantiate the husband's charges, and which the trial court by its findings found to be true, only a portion of which are here referred to. Suffice it to say, in a general way, that the findings are responsive to the pleadings and are sufficiently supported by substantial evidence and, where necessary, corroborated as required by section 130 of the Civil Code, and that the trial judge was fully warranted in his view of the merits of the case, so far as we can discover from the cold pages of the transcript.

The plaintiff's charge, found to be true, that the wife had suffered a miscarriage by reason of a self-inflicted abortion, giving birth to a fetus of such growth as to preclude the belief that conception had taken place by reason of the accessibility of the plaintiff, was sufficiently corroborated. The probable age of the evacuated fetus was testified to by the surgeon called in to administer to defendant. The husband's testimony of the admission on the part of the wife as to the instrument which she had used was corroborated by the discovery by a third party of such instrument in defendant's home, which, by the testimony of another physician, was proven to be well suited to the operation complained of.

[3] The following language from the learned author of the opinion in the case of *Robinson v. Robinson*, 159 Cal. 203, [113 Pac. 155], is relevant to the present case: "The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal."

The defendant has assigned a number of errors claimed to have been committed by the trial court in the admission

and exclusion of evidence, and which, it is contended, warrants a reversal of the judgment.

The reporter's transcript of the testimony in this case embraces 852 pages of typewritten matter. No attempt was made to print in the briefs of the appellant any portion of the testimony relative to or having even the most remote bearing upon the alleged errors of the court with reference to rulings upon matters of evidence, as required by section 953c of the Code of Civil Procedure. While this court does not feel under any compulsion to examine the very voluminous record with reference to these alleged errors referred to in the briefs of appellant, it has, nevertheless, done so under the feeling that the welfare of two children is vitally concerned, and that this is an action in which the state is also an interested party, and that to require counsel now to file a supplement to appellant's brief would be to entail further delay.

After a careful examination of each of such asserted grounds of error we cannot find error of any substantial weight. We are inclined to believe that there was too wide a departure from the issues of the case permitted in the examination of witnesses relative to the character and conduct of the mother-in-law of plaintiff, but such error being upon a collateral matter is of no grave importance.

The court did not commit error in admitting evidence in support of the allegation concerning defendant's departure from the family home. *Smith v. Smith*, 62 Cal. 466, does not purport to establish a rule of evidence, nor attempt to state a positive rule of law to be applied to other like cases where the conditions are not identical. [4] Whether or not any specific absence of one spouse from the family home, without the knowledge or consent of the other, constitutes extreme cruelty, depends entirely upon facts and circumstances of each particular case.

In the instant case, however, the mere absence of the defendant from the family home without plaintiff's consent is not made the basis of his cause of action. That is but a single element in the theory of plaintiff's case.

[5] Whether or not any particular acts or course of conduct constitutes extreme cruelty within the meaning of the law is a question of fact to be deduced from all the circum-

stances of each case. (*Barnes v. Barnes*, 95 Cal. 171, [16 L. R. A. 660, 30 Pac. 298].)

Certain of the findings of the court, beside that already stated, are made the object of attack as not having the proper support in the evidence. Commenting briefly upon these criticisms we may say that an examination of the record of the case shows such attacks to be without merit. There was sufficient evidence to show that the defendant left her home against the will and over the protest of the plaintiff; that the defendant's mother was an inmate of the home of plaintiff and defendant and was permitted to exercise an evil influence over her daughter; that in the absence of plaintiff, the defendant was in the habit of inviting men who were strangers to plaintiff to the home of plaintiff and defendant; that defendant was in the habit of frequenting dances and associating with persons unknown to plaintiff; and that defendant suffered the miscarriage already referred to in order to conceal from plaintiff her condition of pregnancy for which plaintiff was not responsible. These findings are sustained by the testimony of either the husband with proper corroboration or by the testimony of other witnesses.

The claim of counsel for defendant that the findings against the truth of certain of the allegations contained in her cross-complaint are not sustained by the evidence may be dismissed with the remark that, since the trial court was the judge of the credibility of the witnesses below, who gave conflicting testimony upon the subject of defendant's allegations, this court cannot now weigh the evidence in order to see where the preponderance of proof lay.

The judgment is affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 3011. First Appellate District, Division One.—August 29, 1919.]

ANDREW PARK, Respondent, v. THOMAS J. ORBISON,
Appellant.

- [1] **NEGLIGENCE—COLLISION OF AUTOMOBILE WITH PEDESTRIAN—FINDING—EVIDENCE.**—In this action for damages for personal injuries received in a collision with an automobile, the defendant's negligence was clearly established, he having approached the crossing where the accident occurred driving on the wrong side of the street and at an excessive rate of speed, without sounding any warning, notwithstanding his view thereof was obscured.
- [2] **ID.—FAILURE TO LOOK BOTH DIRECTIONS.**—In such an action the plaintiff is not precluded from recovering because, having seen the lights of automobiles coming from both his left and his right before starting to cross the street, he did not keep a lookout for both approaching machines, but waited until he reached the center of the street before again looking to the right to observe the approach of cars from that direction.
- [3] **ID.—USE OF PUBLIC STREETS—DUTIES OF PEDESTRIANS AND DRIVERS OF VEHICLES.**—While pedestrians walking across busy public streets are required to use ordinary care to see that they do not collide with or are run over by vehicles, drivers of vehicles likewise must use ordinary care to prevent injury to pedestrians under such circumstances.
- [4] **ID.—OBJECTIONABLE ANSWER—REMEDY.**—Where the question asked by counsel for the plaintiff is proper but a portion of the answer given is hearsay, or otherwise objectionable, the remedy is for counsel for defendant to make a motion at that time to strike out the objectionable portion of the answer. Having failed to avail himself of such remedy, the defendant may not be heard on appeal to complain of the admission of such testimony.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Affirmed.

The facts are stated in the opinion of the court.

3. Rights and duties of pedestrians in highways with respect to automobiles, note, 4 Ann. Cas. 400.

Rights and duties of automobile driver toward pedestrians in highway, notes, 13 Ann. Cas. 464; 21 Ann. Cas. 652; Ann. Cas. 1916E, 666; 24 L. B. A. (N. S.) 557.

Duke Stone for Appellant.

Wheaton A. Gray for Respondent.

BARDIN, J., *pro tem.*—Plaintiff was awarded a judgment for one thousand dollars for damages suffered by him through the alleged negligent operation of an automobile of the defendant at the intersection of Hill and First Streets, in the city of Los Angeles. The defendant denied negligence upon his part and in further defense to the action pleaded affirmatively the contributory negligence of the plaintiff.

The accident took place on the evening of December 16, 1914, at about the hour of 7 o'clock P. M. and at a time when it was dark and stormy. The plaintiff was proceeding eastward on the south side of First Street and intended to cross Hill Street at its intersection with First Street. When he reached the outer edge of the sidewalk, and before stepping out into Hill Street proper, he looked and listened for approaching vehicles coming from both directions on that street. He was carrying a typewriter in his hands at the time and laprobe over his shoulders. At about two hundred feet to the north of the intersection of the streets referred to the traffic on Hill Street is accommodated by two tunnels, one for the use of a railway and the other for the use of automobiles and pedestrians. Plaintiff testified that he heard the sound of an automobile emerging from the tunnel to the north and coming toward him, and that he saw, near the intersection of Hill and Second Streets, which would be to the south and approximately four hundred feet distant, the light of an automobile approaching from that direction. Estimating that he had an abundance of time to cross the street without danger from the machine approaching from his right, he continued his journey across Hill Street, with his eyes fixed upon the machine approaching from his left, and which was close at hand. At the instant the plaintiff reached the center of Hill Street, which at that point is fifty-six feet wide from curb to curb, he looked to his right, that is, to the south, and saw the flare of the light of the automobile driven by the defendant, and attempted to escape the impending danger by stepping backward. When he first observed this machine it was distant, so plaintiff testified, about fifteen or twenty feet and coming rapidly toward him. Plaintiff heard

no warning of its approach and it is not claimed by the defendant that any such warning was given. The effect of its projected light was overcome by the light of the cars approaching from the opposite direction. The particular street crossing was well lighted at the time by street lights.

The plaintiff, unable to escape collision, was knocked down and received personal injuries for which, and for loss of earnings by reason thereof, the court awarded him judgment.

The plaintiff, a lawyer and publisher by occupation, stated that he was, at the time of the accident, familiar with the terms of the statute regulating the use of motor-driven vehicles upon streets and highways and believed that he was exposed to no danger from any vehicle approaching from the south until he had passed the center of the street.

It may be stated that the automobile tunnel already referred to is situate at the east side of Hill Street, the west wall of which projects twenty-three feet out into the street. By reason of this, all automobiles using this tunnel are accustomed to make the east side of Hill Street in the near vicinity of the tunnel, the principally traveled part of that highway, such use extending to about the intersection of First Street, of which practice both parties to the action were familiar.

The defendant testified that at the time of the accident he was traveling very slowly and on the right-hand side of the street. The evidence is sharply conflicting upon both these elements. An eye-witness to the accident estimated the speed of defendant's automobile at that time to be at the rate of from ten to twelve miles per hour, while the plaintiff testified the rate to be from fifteen to twenty miles per hour. If the offending machine traveled as far as four hundred feet, or substantially that distance, while the plaintiff was walking from the curb to the center of the street, a distance of twenty-eight feet, it follows that the speed of defendant's automobile had, at least immediately previous to the accident, been very rapid. It is very plainly shown by direct and indirect evidence produced at the trial that the defendant was not traveling on his right-hand side of the street as claimed, and that the plaintiff was struck while at a point west of the center of Hill Street.

[1] It appears very clear to us that the defendant did not operate his automobile at the time of the accident in a

careful and prudent manner and with due regard for the safety of pedestrians. His view of the crossing at the intersecting streets was obscured and obstructed by reason of the condition of his windshield because of the falling rain, yet, notwithstanding this, he was traveling at a rate of speed in excess of one mile in six minutes. He blindly ran his machine across these intersecting streets where pedestrians might very well be expected to be. He did not see the plaintiff until it was too late to avoid striking him. He sounded no warning of his approach at the street crossing. He was not traveling upon his right-hand side of the street as the statute and common usage required, and there was no obstruction or condition of the street requiring his departure from this rule of the road. The evidence abundantly supports the findings of the trial court as to the defendant's negligence.

[2] It is insisted that the plaintiff should be precluded from recovering in this action for the reason that his conduct clearly established contributory negligence in that it was plaintiff's duty to keep a sharp lookout for the approach of vehicles coming from both directions and at all times and at every point while crossing the street; and that, having seen the lights of automobiles coming from both his left and his right, he should have kept a lookout for both approaching machines, although he had not passed the center line of the street at the time of the accident.

[3] While it is true that pedestrians walking across busy public streets are required to use ordinary care to see that they do not collide with or are run over by vehicles, it is likewise true that the drivers of vehicles must use ordinary care to prevent injury to pedestrians under such circumstances. (*Brown v. Brashear*, 22 Cal. App. 135, [133 Pac. 505]; *Wiezorek v. Ferris*, 176 Cal. 353, [167 Pac. 234].)

The scene of the accident was in the business section of a populous city. The plaintiff did as a prudent man would have done under like circumstances. He was justified in his belief that he had ample time to at least reach the center of Hill Street before there could be any danger coming from his right. He was warranted in believing that any machine approaching from that direction would, as required by law, and in conformity with the customary usage of the street at that particular place by reason of the local conditions well

known to both plaintiff and defendant, and already referred to, travel on the east side of Hill Street. And he furthermore was entitled to the assurance that the driver of any vehicle approaching from his right would use such care and circumspection as the circumstances required, and that such machine would not approach at an excessive rate of speed nor endanger him without warning. (Vehicle Act 1913, secs. 12, 20 and 22, Stats. 1913, c. 326.) For the trial court to have held as a matter of law that the plaintiff's conduct was such as to constitute negligence under the circumstances set out would have required the adoption of a standard of care and circumspection on the part of a pedestrian crossing intersecting streets not in accord with the customary use of streets by pedestrians under like circumstances, nor obedient to any rule of law which has been brought to our attention.

The cases of *Niosi v. Empire Laundry Co.*, 117 Cal. 257, [49 Pac. 185], and *Brown v. Pacific Electric Ry. Co.*, 167 Cal. 199, [138 Pac. 1005], do not justify the contentions made by appellant on this particular point. The question of whether the conduct of plaintiff, upon the occasion referred to, amounted to negligence or not is to be determined from the attendant circumstances. He was not bound to look and listen for approaching vehicles when he started across the street, regardless of the circumstances of his environment. There might well be circumstances when to fail to do so would amount to negligence. (*Mann v. Scott*, 180 Cal. 550, [182 Pac. 281].) And for like reasons it cannot be said, as a matter of law, that plaintiff was negligent in not keeping a vigilant lookout for approaching machines coming from both directions before he reached the center of the street.

But in the instant case the evidence shows that, whether required by any positive rule of law or not to look and listen for approaching vehicles coming from both directions before crossing the street, the plaintiff did in fact so act. It is true that he did not look to his right again until he reached the center of the street, but, as a reasonably prudent man, he was justified in this conduct by reason of the attendant circumstances. Not only had he estimated that he had ample time to cross the street before he would be liable to any danger from the defendant's automobile on account of its

relatively great distance from him when he took up his journey across the street, but he had the right to assume that the driver of that machine would perform his duty and obey the law. (*Harris v. Johnson*, 174 Cal. 55, [Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155]; *Scott v. San Bernardino Valley etc. Co.*, 152 Cal. 604, [93 Pac. 677].)

The question of plaintiff's alleged contributory negligence was a question for the trial court, and the following language from the somewhat similar case of *Blackwell v. Renwick*, 21 Cal. App. 131, [131 Pac. 94], may well be applied to this case: "In this case, under the state of the evidence, as we have briefly summarized it, it became the duty of the court to determine the question as to the negligence of the defendant and as to whether plaintiff was, under all of the circumstances shown, guilty of contributory negligence, and with the conclusion thereon made, under the authorities, an appellate court cannot interfere."

[4] There is no merit in the claim that the court committed error in admitting hearsay evidence when it permitted the plaintiff to testify as to the effect attacks of dizziness, stated to have resulted from the injury complained of, had upon his mental feelings. The question was a proper one, and not objected to. In answer to this question it was testified that upon one occasion, a considerable time after the accident, when attacked by dizziness, plaintiff saw a former business associate with a broad smile upon his face, who asked the plaintiff "where he had gotten his drink." Counsel for the defendant was silent until the question had been fully answered and then said, "We object to that as incompetent, irrelevant, and immaterial." The claim is now made that a portion of the answer was hearsay and was a conclusion of the witness and too remote in time to be admissible at all. The proper remedy was for counsel for the defendant to have made a motion at the time this testimony was given to strike out the objectionable portion of the answer, if it contained any such matter. (*People v. Swist*, 136 Cal. 520, [69 Pac. 223]; *People v. Cole*, 141 Cal. 88, [74 Pac. 547].) Having failed to avail himself of the remedy at hand, defendant may not now complain, even though the objection made at the trial be now subject to amendment so as to include grounds of objection not then stated, which of course, cannot be granted. The portion of the answer now

criticised, while perhaps not directly responsive to the question, was relevant and material to the issue of damages.

The judgment is affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2929. First Appellate District, Division One.—August 30, 1919.]

AMERICAN IMPROVEMENT CO. (a Corporation), Respondent, v. E. R. LILIENTHAL et al., Defendants; W. P. HAMMON, Appellant.

- [1] **BANKRUPTCY—COMPOSITION—NATURE OF.**—A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the court, and, after notice and hearing, if approved by the court, an order is made confirming the same.
- [2] **ID.—EFFECT OF CONFIRMATION.**—Confirmation of a proposed composition is in effect a discharge. Its effect is to supersede the bankruptcy proceedings, and reinvest the bankrupt with all his property free from the claims of his creditors.
- [3] **ID.—REINVESTMENT OF BANKRUPT WITH PROPERTY.**—While the bankrupt is reinvested with all his property by the composition, its effect in that regard is no more than to place it back in his hands as it was before the insolvency proceedings were instituted.
- [4] **ID.—RELATIVE EFFECT OF DISCHARGE AND COMPOSITION.**—The composition has no more effect than a discharge would under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in section 17 of the Bankruptcy Act. A discharge, however, is not a payment or an extinguishment of the debts; it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not itself invalid. The discharge has merely destroyed the remedy, not the indebtedness.
- [5] **ID.—VALID LIENS NOT DISCHARGED.**—A valid lien, created on the property of the bankrupt more than four months before the filing

5. Effect of discharge in bankruptcy upon real property liens, note, 42 L. R. A. (N. S.) 292.

of the petition in bankruptcy, is not affected by his discharge. The discharge does not operate to cast off good and valid liens, given or acquired for the debt, nor to prevent their enforcement. It is purely personal to the bankrupt.

- [6] **ID.—JUDGMENT LIEN—EFFECT OF COMPOSITION.**—A judgment lien, obtained by filing a transcript of the judgment in the county recorder's office of the county in which the bankrupt owns property not exempt from execution, is not destroyed by involuntary bankruptcy proceedings commenced more than four months after such filing, when a composition between the bankrupt and his creditors is reached and confirmed by the court, although such composition releases the bankrupt from further personal liability to pay the judgment obtained against him.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying motions to stay and recall executions on a judgment and to discharge the judgment of record. James M. Troutt, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

Charles W. Slack for Appellant.

William P. Hubbard for Respondent.

WASTE, P. J.—This is an appeal by W. P. Hammon, one of the defendants in an action commenced in the superior court of the city and county of San Francisco by the American Improvement Company against E. R. Lilienthal and others, from a special order, made after final judgment in the action, denying the motions of the defendant Hammon to stay and recall executions on the judgment and to discharge the judgment of record.

Judgment for the sum of \$5,813.72 was recovered on October 19, 1916, against the defendants as guarantors of the payment of a promissory note executed by Northern Electric Railway Company and delivered to the plaintiff. Judgment was docketed on October 20, 1916, and a certified copy of the transcript of the docket was filed in the office of the county recorder of the county of Santa Barbara on November 8, 1916, at which latter date the defendant Hammon was the owner of certain real property, not exempt from execution, situated in that county. On the same date a tran-

script of the judgment was filed in the office of the county recorder of Placer County. The judgment is final, no part of it has been paid, and it has never been satisfied, unless by the composition in the bankruptcy proceedings, herein-after referred to.

An involuntary petition in bankruptcy was filed against the defendant Hammon on September 27, 1917, in the district court of the United States for the northern district of California, southern division. Thereafter, Hammon filed in the bankruptcy proceedings an offer to pay the sum of two hundred and fifty thousand dollars in satisfaction of his liabilities. On August 31, 1918, the district court made an order confirming the composition, the offer having been accepted by a majority, in number and amount, of the creditors. No order of adjudication of bankruptcy has ever been made in the proceedings. The plaintiff was included in the schedule filed by Hammon, in the bankruptcy proceedings, as one of the secured creditors. It has had full knowledge and notice of the proceedings, and of the composition, and the proceedings in relation thereto. It never filed any claim in the bankruptcy proceedings nor participated therein in any respect whatsoever. It received no money upon its judgment, under the composition or otherwise, and took no part in the composition.

An execution on the judgment was issued on September 19, 1918, directed to the sheriff of the county of Santa Barbara, and under it certain real property was advertised for sale. The property had been conveyed by Hammon to the Oil-fields Syndicate on September 6, 1917, less than one month prior to the filing of the petition in bankruptcy, and ten months after plaintiff's judgment lien attached. It was not included in the list of assets of the defendant scheduled therein. Executions on the judgment, directed to the sheriffs of Placer, Monterey, Fresno, and Alameda Counties, and of the city and county of San Francisco, were also issued on September 19, 1918, but no levies appear to have been made thereunder.

Motions were made by the defendant Hammon, previous to the time appointed for the sale of the real property, to stay and recall the executions and to discharge the judgment of record on the ground that the judgment had been satisfied and discharged by the composition effected by Hammon with his

creditors in the bankruptcy proceedings, and the lien of the judgment extinguished thereby. The motions were denied and from the order denying the motions this appeal is taken.

One proposition is presented for consideration on this appeal: Is a judgment lien, obtained by filing a transcript of the judgment in the county recorder's office of the county in which the bankrupt owns property not exempt from execution, destroyed by involuntary bankruptcy proceedings commenced more than four months after such filing, when a composition between the bankrupt and his creditors was reached and confirmed by the court?

Concisely stated, it is the contention of appellant that the effect of the order of confirmation, made in the bankruptcy proceedings, was to discharge the bankrupt, Hammon, from his indebtedness to the plaintiff, and to revest in the bankrupt the title to his property; that the order of confirmation, being in effect a discharge, the bankrupt was released thereby from liability on the judgment, the lien of which was avoided, although obtained more than four months prior to the filing of the petition in bankruptcy.

[1] A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the court, and, after notice and hearing, if approved by the court, an order is made confirming the same.

[2] Confirmation is in effect a discharge. (2 Remington on Bankruptcy, sec. 2349; *Cumberland Glass Mfg. Co. v. De Witt*, 237 U. S. 447, [59 L. Ed. 1042, 35 Sup. Ct. Rep. 636, 34 Am. Bankr. Rep. 723, see, also, Rose's U. S. Notes]; *United States ex rel. Adler v. Hammond*, 104 Fed. 862, [44 C. C. A. 229, 4 Am. Bankr. Rep. 736]; *In re Friend*, 134 Fed. 778, [67 C. C. A. 500, 13 Am. Bankr. Rep. 597].) Its effect is to supersede the bankruptcy proceedings, and re-invest the bankrupt with all his property free from the claims of his creditors. (*In re Rider*, 96 Fed. 808, [3 Am. Bankr. Rep. 179]; sec. 70f, Bankrupt Act.)

Section 14c of the Bankrupt Act provides: "The confirmation of a composition shall discharge the bankrupt from his

debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge."

[3] While the bankrupt is reinvested with all his property by the composition, its effect in that regard is no more than to place it back in his hands as it was before the insolvency proceedings were instituted. Strictly speaking, no adjudication of bankruptcy having been made, defendant was never divested of his property. (*Houston v. Shear* (Tex. Civ. App.), 210 S. W. 976, [43 Am. Bankr. Rep. 462, 469].)

[4] The composition has no more effect than a discharge would have under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in section 17 of the act. A discharge, however, is not a payment or an extinguishment of the debts; it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not itself invalid. The discharge has merely destroyed the remedy, but not the indebtedness. (*Zavelo v. Reeves*, 227 U. S. 629, [Ann. Cas. 1914D, 664, 57 L. Ed. 676, 33 Sup. Ct. Rep. 365, see, also, *Rose's U. S. Notes*]; 2 Remington on Bankruptcy, secs. 2668, 2672.) [5] A valid lien created on the property of the bankrupt more than four months before the filing of the petition in bankruptcy is not affected by his discharge. (*Evans v. Rounsaville*, 115 Ga. 634, [42 S. E. 100, 8 Am. Bankr. Rep. 236].) The discharge does not operate to cast off good and valid liens, given or acquired for the debt, either a lien by contract or by legal proceedings, nor to prevent their enforcement. It is purely personal to the bankrupt. (*Evans v. Staalle*, 88 Minn. 253, [92 N. W. 951, 11 Am. Bankr. Rep. 184]; *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, [58 L. R. A. 770, 88 N. W. 703, 7 Am. Bankr. Rep. 510]; *Paxton v. Scott*, 66 Neb. 385, [92 N. W. 611, 10 Am. Bankr. Rep. 80].) [6] Undoubtedly, the composition released Hammon from further personal liability to pay the judgment obtained against him in the action, but it did not affect the security afforded by his lien. (*Bassett v. Thakara*, 72 N. J. L. 81, [60 Atl. 39, 16 Am. Bankr. Rep. 786].)

Appellant contends that the judgment against him was satisfied by the composition; that as the Bankruptcy Act makes no provision concerning the existence of the lien of the

judgment, after the judgment itself has been discharged by composition, the lien was itself released and discharged thereby and ceased to exist. The cases already cited by us refute that contention. A discharge is not a payment or extinguishment of the debt. Only the remedy, not the indebtedness, has been destroyed—the debt can no longer be enforced as a personal obligation. (*Zavelo v. Reeves, supra.*) Section 67e of the Bankruptcy Act provides the condition under which a lien, created by or obtained in any suit or proceeding in law or equity begun against a person within four months before the filing of a petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt. Section 67f of the act provides that “all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustee as part of the bankrupt, unless the court” shall otherwise order. It will be noted that these provisions apply only to liens obtained within four months prior to the filing of the petition in bankruptcy, and only then, in the event that an adjudication in bankruptcy shall result. Nothing in the act to which our attention has been called makes any such provision as to judgments or liens obtained more than four months prior to the filing of the petition. To the contrary, the courts have held that, as to such lien another rule is applicable.

Referring to section 67f, the United States supreme court has said: “In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to filing the petition, it is not only not to be deemed to be null and void, on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If

this were not so the date of the acquisition of a lien by attachment, or creditor's bill, would be entirely immaterial." (*Metcalf v. Barker*, 187 U. S. 165, 174, [47 L. Ed. 122, 23 Sup. Ct. Rep. 67, 71, see, also, Rose's U. S. Notes]; see, also, *In re Snell*, 125 Fed. 154; *In re English*, 122 Fed. 113; *Oilfields Syndicate v. American Improvement Co.*, 256 Fed. 979, in the district court of the United States for the southern district of California, February 27, 1919.)

It would seem, therefore, that the lien of plaintiff, having been obtained more than four months prior to the petition in bankruptcy filed against defendant, if otherwise valid, was not affected by the composition reached by defendant and his creditors in the bankruptcy proceedings.

That the lien attached by filing the transcript of judgment in Santa Barbara County is not open to dispute. It continued for two years from and after the date of filing (Code Civ. Proc., sec. 674), and had been in force for over eleven months when the petition in bankruptcy was filed.

Appellant and respondent have devoted much time to a consideration of the question whether or not plaintiff was a secured creditor of defendant. Whether plaintiff is or is not a secured creditor would not, in our opinion, alter the relation of the parties toward each other in connection with plaintiff's right, under the present facts, to proceed to realize on its lien, which was preserved to it by the composition. No authorities have been cited to us holding that if it were a secured creditor it would be compelled, upon composition, to surrender its security to defendant. Such would be the practical result if plaintiff were not now allowed to enforce its lien. We are not here dealing with the right of a secured creditor to stand upon his right to a certain portion of the assets of the estate by virtue of some security upon property of the bankrupt, but with the right of a judgment lienor to enforce his lien, acquired by legal process, after he has been cut off from all further legal proceedings for the collection of his debt.

When counsel for the appellant admits in his brief that "there is also no doubt that if a lien is acquired in legal proceedings without the four months' period, the lien is not discharged by an adjudication of, and a discharge of the lien debtor in bankruptcy, there being no composition," he con-

cedes the respondent's case. As we have before pointed out, the effect of a composition and a discharge is the same.

No liens were acquired by plaintiff in the counties of Fresno, Monterey, or Alameda, or in the city and county of San Francisco, the transcript of the judgment not having been recorded in either. The cause is remanded to the lower court with instructions to recall and quash the execution issued to the sheriffs of Fresno, Monterey, and Alameda Counties and to the sheriff of the city and county of San Francisco. Otherwise the order of the lower court refusing to recall and quash the execution is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 28, 1919.

All the Justices concurred.

[Civ. No. 2810. First Appellate District, Division One.—August 30, 1919.]

ELLA M. MURPHY, Respondent, v. ARTHUR F. BRIDGE,
Administrator, etc., et al., Appellants.

[1] TRUSTS—HOLDING PROPERTY AS SECURITY—DETERMINATION OF OWNERSHIP IN PREVIOUS ACTION—NEW TRIAL—JUDGMENT NOT RES ADJUDICATA.—In an action in equity to have it adjudged that the legal title to the property in dispute was held by defendant's intestate in trust and as security for the debt of the husband of the plaintiff to said intestate, a judgment rendered in a previous action brought by a third party against all the parties to the case at bar, and relating to the same property, is not *res adjudicata* in the case at bar where a new trial was granted in such prior action, notwithstanding that in such prior action judgment was rendered against plaintiff in the case at bar and she did not make a motion for a new trial nor appeal from the judgment therein.

[2] NEW TRIAL—ORDER IN GENERAL TERMS GRANTING—EFFECT OF.—The effect of an order in general terms granting a new trial,

generally speaking, is to open up the entire case as to all the parties, regardless of the fact that some of them may not have moved for a new trial.

APPEAL from a judgment of the Superior Court of Alameda County. Stanley A. Smith, Judge. Affirmed.

The facts are stated in the opinion of the court.

Haven & Athearn for Appellants.

Edward C. Harrison and Maurice E. Harrison for Respondent.

KERRIGAN, J.—This is an appeal from an interlocutory decree adjudging plaintiff to be the owner of the real property described in the complaint subject only to a lien of defendant, May E. Bridge, for the unpaid balance of a certain debt. The suit is one in equity, brought by plaintiff against Arthur F. Bridge and May E. Bridge, as administrators with the will annexed of F. W. Bridge, deceased, and May E. Bridge, individually, to have it adjudged that the legal title to the property in dispute was held by F. W. Bridge in his lifetime in trust and as security for the debt of Herman Murphy, husband of plaintiff, to F. W. Bridge.

The complaint alleges that the debt has been practically all paid, and the prayer is that plaintiff be adjudged to be the owner in fee of the property, subject only to the lien of any unpaid balance upon the debt, and that an accounting be had to ascertain such balance, if any. Judgment went for plaintiff in conformity with her prayer. Defendants moved for a new trial, which motion was denied. From the interlocutory decree defendants have appealed.

The record title to the property in dispute is now in defendant, May E. Bridge, as the successor in interest of F. W. Bridge, deceased, having been distributed to her under a decree of partial distribution in the estate of F. W. Bridge, deceased. [1] The only ground upon which a reversal of the judgment is sought is the action of the trial court in rejecting as evidence the judgment-roll in an action entitled "*Miller v. Murphy*," in which action it is claimed the rights of the parties to the property in dispute have been definitely

settled, and that the judgment rendered therein is *res adjudicata* in the instant case.

The suit of *Miller v. Murphy* was one brought by the plaintiff therein against Ella M. Murphy and Herman Murphy, her husband, and F. W. Bridge and others, as defendants, to have it determined that the title to the property here involved was held by F. W. Bridge subordinate to and subject to the claim of such plaintiff. In that action plaintiff herein and F. W. Bridge answered, denying generally all the allegations of the complaint. Defendant Bridge, in his answer, further alleged that he was the sole owner of the property, and prayed that it be adjudged that neither Miller nor defendants, Herman Murphy or Ella M. Murphy, had any interest therein. The court, after a trial of that case, found that defendant F. W. Bridge was the owner of the property, and that he did not hold the same subject to any claim of the plaintiff whatsoever, and that none of the other defendants had any right, title, or interest in the property. Accordingly, it was adjudged and decreed that defendant F. W. Bridge was the owner thereof. Thereafter the plaintiff Miller moved for a new trial, which motion was granted. Plaintiff herein, Ella M. Murphy, made no such motion, nor did she appeal from the judgment. Beyond question the judgment was the one she desired, for the record herein discloses the fact that she and her husband co-operated with Bridge in procuring it. It is the appellant's contention that as between defendant F. W. Bridge and his codefendant, Ella M. Murphy, the judgment in the suit of *Miller v. Murphy* became final, and that the judgment definitely determined the status of the property involved as between them, for the reason that the subject matter in that case was the same as the subject matter of the instant case, and that, therefore, the judgment rendered therein is *res adjudicata* in the case at bar.

This contention presents two questions—first, Was the judgment as originally rendered in *Miller v. Murphy* an adjudication upon the claim of the plaintiff in this case? and, second, if it was, did the granting of a new trial in that case have the effect of entirely vacating the judgment as such an adjudication?

The principles involved in the first question, namely, whether or not the pleadings in *Miller v. Murphy* raised an issue which was or could have been litigated between the

parties hereto, or whether or not they were adverse parties within the meaning of that term, are questions we do not deem it necessary to discuss or determine, for we are of the opinion that the order granting a new trial in *Miller v. Murphy* vacated and terminated the judgment rendered therein.

[2] The order granting the new trial was general in its terms. The effect of such an order, generally speaking, is to open up the entire case as to all the parties regardless of the fact that some of them may not have moved for a new trial. (1 Hayne on New Trial and Appeal, sec. 167; *Kent v. Williams*, 146 Cal. 3, [79 Pac. 527]; *Joost v. Dore*, 27 Cal. App. 729, [151 Pac. 29].)

It is appellants' contention, however, that the rule applies only where the judgment is such that it could not be set aside as to one without being set aside as to all, and that the rule has no application where the judgment is severable. Conceding this to be true, no such situation is here presented. The motion for a new trial and the order granting the same were both general in terms. The judgment was predicated upon the issues tendered between the plaintiff and all the defendants, and was rendered against all of them; and the subsequent order, general in its terms, granting a new trial, vacated the entire judgment and had the effect of placing the parties in the position they held before any trial had taken place. Undoubtedly, the parties herein could have litigated, under appropriate pleadings in the *Miller* case, the rights here involved, but no such relief was sought by them, they contenting themselves in that case with defeating the claim of the plaintiff therein.

For the reasons given the judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 28, 1919.

All the Justices concurred.

[Civ. No. 2983. First Appellate District, Division One.—September 2, 1919.]

A. W. GREENE, as a Creditor, etc., Appellant, v. WM. H. MOORE, Jr., as Trustee in Bankruptcy, etc., Respondent.

- [1] **BANKRUPTCY—ACTION BY CREDITOR AGAINST TRUSTEE—FAILURE OF TRUSTEE TO COMMENCE ACTION ON BEHALF OF ESTATE—INSUFFICIENT COMPLAINT.**—In an action by a creditor of a bankrupt on behalf of himself and other creditors against the trustee in bankruptcy for damages for refusal to commence an action against certain parties who are alleged to have seized and sold certain property of said bankrupt, and for the value of which said parties are said to be liable to his estate, the complaint does not state a cause of action where it fails to allege an abuse of the discretion with which the trustee is invested with respect to the bringing of actions in the interest and for the benefit of the estate.
- [2] **ID.—BRINGING OF ACTIONS ON BEHALF OF BANKRUPT ESTATE—DISCRETION OF TRUSTEE—RIGHTS OF CREDITORS.**—The trustee in bankruptcy and not a creditor or any number of creditors is the sole judge of the matter of when or whether to bring such actions; and in the absence of an abuse of the discretion with which he is invested he is not subject to the dictation or control of the creditors of the estate.
- [3] **ID.—JURISDICTION OF FEDERAL COURTS EXCLUSIVE—REMEDY OF CREDITORS.**—While the proceedings in bankruptcy are pending in the federal court, the jurisdiction of that court over the assets of the bankrupt and the actions of the trustee in bankruptcy is exclusive. The remedy of a creditor is to apply to the federal court for relief from any neglect or refusal of the trustee to perform his duty, and that court upon a proper showing will compel the trustee to proceed or remove him for his disobedience or neglect of duty.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. M. Barnes for Appellant.

1. Liability of trustee in bankruptcy for failure to collect assets, note, 16 L. B. A. (N. S.) 341.

Bowen & Bailie, Norman A. Bailie and Frederick W. Lake
for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's complaint without leave to amend.

The action is one brought by the plaintiff as one of the creditors of one R. B. Tolmie, a bankrupt, the plaintiff purporting to bring said action on behalf of himself and many other creditors of said bankrupt, though who or how many of these creditors there are, or by what authority the plaintiff assumes to represent them, is not made to appear. The complaint alleges that the proceedings in bankruptcy of said Tolmie are pending in the United States district court of the southern district of California, wherein the said Tolmie has been duly adjudicated a bankrupt, and wherein the defendant herein has been, and still is, the duly appointed, qualified, and acting trustee of the estate of said bankrupt. The complaint further alleges that the plaintiff herein has demanded of such trustee that he commence a certain action against certain parties who are alleged to have seized and sold certain property of said bankrupt, and for the value of which said parties are alleged to be liable to said estate; that the defendant as such trustee has refused to commence said action, by which refusal the plaintiff and the other parties whom he assumes to represent have been damaged in the sum of \$862.27, for which sum he prays judgment against said trustee.

The defendant demurred to this complaint upon two main grounds: First, that said complaint did not state facts sufficient to constitute a cause of action; second, that the court had no jurisdiction of the subject of the action. The court sustained this demurrer generally without leave to amend.

[1] We are of the opinion that the judgment of the trial court rendered after making said order was proper for both of the reasons urged in said demurrer. The complaint failed utterly to show any abuse of the discretion with which the trustees of bankrupts are invested with respect to the bringing of actions in the interest and for the benefit of the estate.

[2] He and not a creditor or any number of creditors is the sole judge of the matter of when or whether to bring such actions; and in the absence of an alleged abuse of the dis-

cretion with which he is invested he is not subject to the dictation or control of the creditors of the estate. (*In re Baird*, 112 Fed. 960; *In re Columbia Iron Works*, 142 Fed. 234; Remington on Bankruptcy, sec. 900.) There being no averment in the complaint herein showing any abuse of this discretion, it failed to state a cause of action.

[3] But the order of the court in sustaining said demurrer without leave to amend is sustainable for another and stronger reason. The proceedings in bankruptcy were pending in the federal court at the time this action was commenced, and the defendant herein was then, and still is, the duly appointed officer of that court. The jurisdiction of the federal court over the assets of said bankrupt and over the actions of said trustee is exclusive, and the state courts have no jurisdiction over either during the pendency there of said proceedings. (*In re Watts*, 190 U. S. 1, [47 L. Ed. 933, 23 Sup. Ct. Rep. 718, see, also, Rose's U. S. Notes]; *In re Anderson*, 23 Fed. 482; *White v. Schloerb*, 178 U. S. 542, [44 L. Ed. 1183, 20 Sup. Ct. Rep. 1007].) None of the cases cited by the appellant holds to the contrary. The remedy of a creditor in such a case as this is complete; he may apply to the federal court for relief from any neglect or refusal of the trustee to perform his duty, and the court upon a proper showing will compel him to proceed or remove him for his disobedience or neglect of duty. The exclusive jurisdiction to thus control its officer rests with said court. It follows that the order of the trial court sustaining the defendant's demurrer without leave to amend was proper.

The judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2156. First Appellate District, Division One.—September 2, 1919.]

M. L. SIMPSON et al., Appellants, v. ELSIE SMITH,
Respondent.

- [1] **PROMISSORY NOTES — CONSIDERATION — EXTINGUISHMENT OF PRIOR RIGHTS.**—The extinguishment of a promissory note executed by the husband prior to his marriage, the consideration for which passed solely to him, constitutes a sufficient consideration for the promise of the wife to pay a new note executed by both of them.
- [2] **FINDINGS — EVIDENCE — APPEAL.**—Every intendment should be indulged in favor of the findings of the trial court, and they should not be overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence.

APPEAL from a judgment of the Superior Court of Alameda County. James G. Estep, Judge Presiding. Reversed.

The facts are stated in the opinion of the court.

Fitzgerald, Abbott & Beardsley for Appellants.

L. R. Weinmann for Respondent.

BARDIN, J., pro tem.—Plaintiffs, who are husband and wife, brought this action to recover a judgment for the balance due of the principal and interest of a promissory note made by defendant and her husband, E. S. Smith, since deceased, dated April 20, 1912, and payable one day after date "to M. L. Simpson or S. E. Simpson." The defendant, who had judgment below, denies liability upon two grounds: (1) That there was no consideration for the promise of the defendant, and (2) that the signature of defendant to said note was procured under duress and through the undue influence of plaintiffs and the husband of the defendant.

The court found, in effect, among other facts, that the defendant did not, for value received, execute to the plaintiffs the promissory note sued upon; that the defendant had never received any consideration of any nature whatsoever for signing said promissory note; that there was no consid-

eration for defendant signing said note; and "that no detriment of any kind or nature was suffered by the plaintiffs . . . or either of them by reason of said instrument."

The affirmative allegations contained in defendant's answer relative to the charge that plaintiffs procured the defendant's signature to the note in question through duress and undue influence were adopted by the trial court in its findings as true, yet there is no evidence whatever in the record which sustains such findings. They are so clearly unsupported by the evidence that they were probably made through inadvertence.

From a review of the evidence adduced at the trial and which was believed by the trial court to warrant the finding that there was no consideration for the promise of defendant contained in the promissory note sued upon, we discover the following germane and uncontradicted facts:

[1] The note in suit was the outgrowth of the demands of plaintiff M. L. Simpson for the payment of a prior promissory note, then due and unpaid, made by the husband of defendant and presumably payable, as stated in respondent's brief, to both plaintiffs. The prior note was made previous to defendant's marriage, and the consideration therefor had passed solely to the said husband of defendant and she was not obligated in any manner under it. Under pressure of plaintiff M. L. Simpson for payment of the first note, or that its payment be secured, the note in suit was drawn, dated, and signed by the husband of defendant and he thereupon handed the note to defendant for her signature. Several days later, and after its maturity, she affixed her signature to the face of the note and returned it to her husband, who thereafter delivered it to the plaintiffs with the understanding that it replace the first note.

It does not appear from the evidence that the defendant participated directly in the arrangement whereby the antecedent debt was discharged by the execution of the new note, other than by signing the note in suit and delivering it to her husband. Some two years thereafter the present action was begun to enforce the payment of the balance due and unpaid on the note last executed.

It is contended by the defendant that, since the note in suit was not delivered until after its maturity, it became, in legal effect, a demand note which the parties might sue

upon as soon as delivered; and that, therefore, no detriment or prejudice was suffered by the plaintiffs, for there could be no enforceable forbearance to sue under the circumstances, and, that since the element of forbearance to sue was not present, there was no consideration for the promise of the defendant.

But this theory eliminates the real consideration for the execution of the note in suit. The consideration for the signature of the defendant to such note is not grounded upon the forbearance of either of plaintiffs to sue upon an antecedent debt, but instead, upon the extinguishment of the prior note of the husband of defendant. The relinquishment of all rights under that note constituted such a detriment and prejudice to the rights of the plaintiffs as to provide a sufficient consideration to support the promise of the defendant to pay the note sued upon. (*Stroud v. Thomas*, 139 Cal. 274, [96 Am. St. Rep. 111, 72 Pac. 1008]; *Lyon v. Robertson*, 6 Cal. Unrep. 390, [59 Pac. 990]; *Hobson v. Hassett*, 76 Cal. 203, [9 Am. St. Rep. 193, 18 Pac. 320]; *Miller & Lux v. Dunlap*, 28 Cal. App. 313, [152 Pac. 309]; Civ. Code, sec. 1605.)

In *Stroud v. Thomas*, *supra*, the court used the following language: "The contention of the appellant that a pre-existing debt is not a sufficient consideration for the execution of a note, so far as the sureties thereon are concerned, where the obligation for the pre-existing debt is canceled upon the delivery of the new note, does not merit discussion. It is well settled that such a consideration is sufficient as a foundation for the promise of the sureties, as well as that of the principals."

Counsel for the respondent places undue reliance upon the cases of *Westphal v. Nevills*, 92 Cal. 545, [28 Pac. 678], and *Whelan v. Swain*, 132 Cal. 389, [64 Pac. 560]. We perceive nothing in those cases contained which is in disagreement with the views herein expressed. In *Westphal v. Nevills*, *supra*, it was held that the detriment to the plaintiff by reason of time given to make payment of an antecedent debt was sufficient consideration to support the promise of the appellant. The effect of the relinquishment of rights under an antecedent note or debt was not involved. And, in the case of *Whelan v. Swain*, *supra*, the consideration supporting a promissory note was based not only upon a for-

bearance to sue, but also because "the old note was surrendered."

[2] While we are aware that every intendment should be indulged in favor of the findings of a trial court, and that they should not be overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence, yet, in this particular case it clearly appears from the uncontradicted testimony adduced at the trial that the consideration for the signature of the defendant to the note sued upon was the relinquishment by plaintiffs of rights under the prior note referred to.

The findings of the trial court to the effect that there was no consideration for the execution of the note in suit by the defendant is without sufficient support in the evidence. The resulting judgment cannot, therefore, be upheld.

Judgment reversed and a new trial ordered.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2957. First Appellate District, Division One.—September 2, 1919.]

FANNIE SLATER CURTIS, Appellant, v. ELLA H. ARNOLD, Respondent.

- [1] LANDLORD AND TENANT—DEPOSIT OF SECURITY—TERMINATION OF LEASE—RIGHT TO RETURN OF DEPOSIT.—Where money is deposited as security for the payment by the lessee of the rent, upon the termination of the lease the lessee is entitled to a return of the sum deposited, less the amount of the rent due and unpaid at the time of the termination.
- [2] ID.—PAYMENT OF BONUS FOR LEASE—RIGHT OF LESSEE TO RECOVER.—If the sum is paid by the lessee as a bonus, as an independent consideration, to induce the lessor to make the lease, a cancellation of the lease by the lessor for any cause which justifies the act will not entitle the lessee to receive back any part of the sum so paid, in the absence of some stipulation in the lease permitting her to do so.
- [3] ID.—AMOUNT PAID AT TIME OF EXECUTION OF LEASE—TERMINATION OF LEASE FOR NONPAYMENT OF RENT—RIGHT OF LESSEE TO RECOVER MONEY—CONSTRUCTION OF AGREEMENT.—Under the terms

of a lease providing that "for and in consideration of the sum of three thousand dollars, the receipt whereof is hereby acknowledged," the lessor "agrees to make and enter into, and does make and enter into," a lease of a certain building to be erected for a period of ten years from and after the completion of the building at a stated total rental payable in given monthly installments, the first month's rent being free, nothing being said as to the amount of rent to be paid for the last five months of the term, and that in the event of the termination of the lease prior to the expiration of the ten-year term, for any reason or cause, except a breach of covenant by the lessee, the lessor will pay to the lessee the sum of three thousand dollars, with interest, provided, however, that if such termination shall occur during the last five months of said term, the amount so payable shall be reduced at the rate of \$925 per month for each of said months as shall have expired prior to said termination, and providing further that if the lessee shall comply with the terms, conditions, and covenants of this lease, he shall have the use of the premises free during the last five months of the term, said free rent being conditioned upon the full performance of all the terms of said lease by the lessee during the entire ten-year term, upon the lessees moving out of the premises less than four years after the completion and taking possession thereof, following notice from the lessor to pay the monthly installment of rent then due and unpaid within three days or deliver possession of the premises, such lessee is not entitled to recover any portion of the fund paid to the lessor at the time of the execution of the lease.

- [4] **ID.—PROVISION AS TO REPAIRS—MAKING OF BY LESSEE—RIGHT TO RECOUP LOSSES OUT OF RENT.**—Under a lease providing that the lessor, at her own cost and expense, shall repair, or cause to be repaired, any defects in said premises due to construction which shall appear during the first twelve months after the completion and acceptance of the building, the lessee is not entitled to recoup her losses of money for repairs made by her after the expiration of such twelve-month period from the rent of the premises as such rent becomes due.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. H. Countryman for Appellant.

Burrell G. White and John Ralph Wilson for Respondent.

WASTE, P. J.—The plaintiff appeals from a judgment, and asks for a review of the order denying a motion for a new trial. The controversy involves the sum of three thousand dollars, on deposit under the terms of a written lease dated March 7, 1910, between defendant, as lessor, and Charles Loeffler, as lessee. The interests and rights of the lessee have been transferred to plaintiff.

The first paragraph of the lease reads as follows:

“For and in consideration of the sum of three thousand dollars (\$3,000) gold coin of the United States of America, the receipt of which is hereby acknowledged, Ella H. Arnold, of the City and County of San Francisco, State of California, agrees to make and enter into, and does hereby make and enter into, to and with Charles Loeffler of the same place the following lease, upon the terms and conditions herein specified, to wit.”

Then follows an ordinary lease made and entered into between the parties, under the terms of which the lessor agrees to erect a certain five-story, class C, building in accordance with plans and specifications therein particularly referred to, for a period of ten years, from and after the date of completion of the building, at the total rental, or sum, of one hundred and two thousand five hundred dollars, in monthly payments (the first month's rent being free) of \$875 per month, for the first five years of the lease, and \$925 for the next four years and seven months of the term. Nothing is said in the lease as to the amount of rent to be paid by the lessor for the last five months of the term.

It was expressly covenanted in the lease that the lessor should, at her own cost and expense, keep the roof and exterior of the premises in good order, condition, and repair during the term of the lease, and should likewise, at her own cost and expense, repair or cause to be repaired any defects in the premises which should appear during the first twelve months after the completion and acceptance of said building, if the defects resulted from the settling of the walls, shrinkage of timbers, defective plumbing, or other defects due to construction.

It was further stipulated in the lease that, otherwise than as above stated, the lessor, after taking possession of the premises, should keep and maintain the interior of the same in good order, condition, and repair during his occupancy, the

injury thereto or destruction thereof by the act of God or the elements or other cause beyond the control of the lessee being excepted. The lessee expressly waived all rights to make repairs of said premises at the expense of the lessor, as provided in section 1942 of the Civil Code of the state of California.

A further stipulation in the lease is:

"That in the event of the determination of this lease prior to the expiration of the ten year term hereby demised, for any reason or cause, except a breach of covenant by the lessee, the lessor will pay to the lessee the sum of three thousand (\$3,000) dollars in gold coin of the United States of America, together with interest thereon from the date of the completion of said building, at the rate of four (4%) per cent per annum, compounded annually, provided however, that if such termination shall occur during the last five months of said term, the amount so payable shall be reduced at the rate of nine hundred and twenty-five (\$925) dollars per month for each of said months as shall have expired prior to said termination. It is understood and agreed that this lease shall not be assigned without the written consent of the lessor. It is understood that if the lessee shall in all respects fully comply with the terms, conditions and covenants of this lease, he shall have the use of the above described premises, herein leased for the last five months of the term herein named and provided, free of rent, and said free rent is conditioned upon the full compliance with the performance of all conditions and covenants of this lease by said lessee both before and during the said last five months hereof."

The building was completed and possession taken by the lessee on or about the thirty-first day of December, 1910. The rent for the month of September, 1914, was not paid. Defendant served on plaintiff a notice, requiring him to pay the rent within three days or deliver possession of the premises. Plaintiff moved out of the premises within the period given, and defendant, in writing, accepted the keys and possession of the leased property.

During plaintiff's occupancy of the house, certain structural defects in the building developed, and plaintiff, after calling the attention of the defendant to these matters, expended certain sums of money in making repairs. Plaintiff brought this action for the recovery of the three thousand

dollars, and interest, paid by her assignor to defendant, under the provision of the lease that has been referred to. Defendant filed an answer and cross-complaint for the amount of the rent for the month of September, 1914. Plaintiff, in answer to the cross-complaint, asserted the right to offset the claim for the rent for that month by the sum of money she expended in making the repairs to the premises hereinbefore and hereinafter referred to. At the trial defendant dismissed her cross-complaint, leaving as the only issue to be tried by the court the question of the right of plaintiff to recover the three thousand dollars. The court eventually held that by the failure of plaintiff to pay the rent in cash for September, 1914, she had so violated the covenants of the lease that, under its terms, she was not entitled to recover that amount, and gave judgment for defendant. The decision of the main issue of the case, to wit, the right of the plaintiff to recover the sum of three thousand dollars, turns upon the determination of the status of that fund now in the hands of defendant. Appellant steadfastly maintains that the amount was deposited with the lessor as security for the performance of the covenants of the lease; that, therefore, it was not forfeited to the lessor by reason of the failure on the part of the lessee to pay the rent accrued for September, 1914. She relies upon *Green v. Frahm*, 176 Cal. 259, [168 Pac. 114], and *Rez v. Summers*, 34 Cal. App. 527, [168 Pac. 156]. Defendant claims that it was paid to defendant by the original lessee as an additional consideration, or bonus, as an inducement to defendant to make the lease. If either of these claims finds support in the pleadings or evidence, the decision of the case presents but little difficulty. [1] If the money was deposited as security for the payment by the lessee of the rent, it is clear that upon the termination of the lease the plaintiff would be entitled to a return of the sum deposited, less the amount of rent due and unpaid at the time of the termination. (*Green v. Frahm*, *supra*; *Rez v. Summers*, *supra*; *Caesar v. Robinson*, 174 N. Y. 492, [67 N. E. 58]; *Michaels v. Fishel*, 169 N. Y. 381, [62 N. E. 425]; *Galbraith v. Wood*, 124 Minn. 210, 213, [Ann. Cas. 1915B, 609, 50 L. R. A. (N. S.) 1034, 144 N. W. 945].) [2] If the three thousand dollars was paid by the lessee as a bonus, as an independent consideration, to induce defendant to make the lease, it is equally clear that a cancellation of the lease by the landlord

for any cause which justifies the act would not entitle plaintiff to receive back any part of the sum so paid, in the absence of some stipulation in the lease permitting her to do so. (*Galbraith v. Wood*, 124 Minn. 210, 214, [Ann. Cas. 1915B, 609, 50 L. R. A. (N. S.) 1034, 144 N. W. 945]; *Dutton v. Christie*, 63 Wash. 372, [115 Pac. 856].)

In the first of the cases relied upon by appellant, *Green v. Frahm*, the language of the lease is that "Cohn hereby deposits with Frahm the sum of \$3,000, receipt of which is hereby acknowledged, said sum of \$3,000 to be maintained by Frahm as a guaranty that Cohn will pay the rent as herein provided, and in the manner herein specified, and will keep and perform each and every covenant herein contained to be performed by Cohn, and in the event of the failure of Cohn to pay the rent, or to keep or perform any of the covenants herein contained, to be performed by Cohn, then and in that event, the said sum of \$3,000 shall become forfeited unto Frahm. On the other hand, if Cohn paid the rent herein reserved, then and in that event, the sum of \$3,000 shall be returned to Cohn, at the end of the term hereinbefore created, or at any sooner termination thereof. Frahm agrees to pay Cohn four per cent interest on the sum of \$3,000, to be paid annually." Another clause provided that in case of any termination of the lease through any fraud or neglect of Cohn, then the three thousand dollars reserved should be repaid to him with interest. Cohn defaulted in payment of rent. Frahm instituted proceedings in unlawful detainer against him, and, upon obtaining judgment, was put into possession of the property. Cohn, by his assignee, began an action against Frahm to recover the three thousand dollars, which, in pursuance of the terms of the lease, had been deposited by Cohn with Frahm at the time of the execution thereof. The judgment was for plaintiff, and Frahm appealed. The supreme court held that the above-quoted provision of the lease naturally divided itself into two parts: One, a provision that the three thousand dollars deposited with Frahm was to be a guaranty for performance by Cohn of the covenants of the lease, including the payments of rent; the other that, in the event of the failure of Cohn to perform any of said covenants, the said money should become forfeited to Frahm; that the provision for a forfeiture upon the failure of Cohn to pay the rent was either a penalty, or a provision that

the three thousand dollars was to be liquidated damages for the breach of the covenants, and in either aspect the provision was void. (*Green v. Frahm, supra.*) The other part of the clause, providing for the deposit of the three thousand dollars as a security for the payment of rent, was held by the supreme court to be for a legal purpose, and in all respects valid and enforceable, and that Frahm had a legal right, in case of the failure of Cohn to pay rent, to retain the three thousand dollars and apply it on the rent until the same was exhausted; that he did not choose to do this, however, but immediately began proceedings for the restitution of the premises and the recovery of the rent due, and had succeeded in obtaining judgment for both, also for cancellation of the lease; that, under these circumstances, he must be admitted to have repudiated the security, and to have waived the right to retain the three thousand dollars as security for the payment of rent subsequently accruing; that the sum as deposited was to be considered as money held by Frahm as bailee, for the use of Cohn, and due demand having been made for its return, the plaintiff was entitled to recover. In *Rez v. Summers*, also relied upon by appellant, the court found "that the sum of eight hundred dollars was received by the lessor as being in full payment for rent for the last two months of the term. But the payment was not absolute and unconditional, since it was also agreed that in certain contingencies this money would be returned to the lessee, and in that part of the contract the eight hundred dollars was referred to as 'security.' "

In neither of the foregoing cases were the facts similar to those of the case at bar. In the instant case, for and in consideration of the sum of three thousand dollars, the receipt of which was acknowledged by the lessor, she agreed to make and enter into the lease to plaintiff's assignor.

This, to our mind, brings the case squarely within the ruling of *Ramish v. Workman*, 33 Cal. App. 19. [164 Pac. 26], and *Dutton v. Christie, supra.* In the first of these cases the provision of the lease was that the lessees would pay to the lessor, as a further consideration for the lease, in addition to the rent therein reserved, the sum of seven thousand two hundred dollars, receipt of which was acknowledged by the lessor. There was a further proviso that if the lessees should pay the rent reserved, when same became due under the lease,

and should well and truly perform and observe all the covenants and agreements contained in the lease on their part to be performed during the first nine years, seven months, and twelve days, and the lease should not be terminated by the re-entry of the lessor as in the lease provided, within that period, the lessor should credit said sum of seven thousand two hundred dollars so paid by the lessees upon the last four months and eighteen days' rent due under the lease. After taking possession under the lease, the lessees made default and were evicted. The lessor also commenced an action to recover rent for the period during which the premises were held and occupied by the lessees. The defendants, by answer and cross-complaint, set up the deposit of seven thousand two hundred dollars, made as hereinbefore indicated, and prayed for its return. Judgment went for the plaintiff, and the defendants appealed, insisting, as does the appellant here, that, notwithstanding the plain language in which the provision of the lease is couched, "the meaning of which, to our minds," said the appellate court, "admits of no controversy," the payment of seven thousand two hundred dollars should be construed as security for the payment of the rent reserved during the time ending with their eviction, and any damages sustained by plaintiff; that when the landlord elected to evict defendants from the premises for nonpayment of rent, he waived all claims to the fund except in so far as it was necessary to apply it in payment of rent then due and accrued. In its decision the court said:

"As stated in *Dutton v. Christie*, 63 Wash. 373, [115 Pac. 857], where a similar question was involved: 'We cannot agree with this contention without in effect writing a new contract for the parties.' Clearly, the seven thousand two hundred dollars was paid for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the

deposit was made with the lessor upon the execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as 'a guaranty,' 'as indemnity,' as 'a penalty,' 'for security,' etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of *Dutton v. Christie*, 63 Wash. 373, [115 Pac. 857].

"The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and thus construed it is clear that the parties intended the seven thousand two hundred dollars to be in the nature of a bonus or additional consideration paid the lessor as an inducement to make the lease upon the terms and conditions therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessees during the first nine years, seven months, and twelve days of the term thereof, he promised in effect to release them from the payment of rent at the rate of one thousand five hundred dollars per month for the last four months and eighteen days of the term so demised, furnishes no reason for appellants' contention."

A rehearing of this case was denied by the supreme court.

The facts in *Dutton v. Christie*, *supra*, are very similar to those under consideration here. The respondent in that case let to the appellants certain premises in the city of Seattle, for the period of five years, under a written lease by which it is provided that the rental of the premises should be \$750 every month in advance. It was stated in the first paragraph of the lease that it was made "in consideration of the covenants of the second parties (appellants) hereinafter set forth, and of the sum of fifteen hundred dollars (\$1,500) now paid to the first party by the second parties, the receipt of which is hereby acknowledged." In a subsequent paragraph of the lease it was stated that the "above payment of fifteen hundred dollars (\$1,500) now made shall, in the event of the full and faithful performance of this contract by the second parties, be credited in payment of rent for the last two months of said term; but otherwise said payment this day made shall

belong to first party as a part of the consideration to them for the execution of this lease." The lessees defaulting, the lessor brought an action to recover the unpaid rent. Judgment was rendered against the lessees, who appealed, claiming that the judgment should have been in their favor for the difference between the advance payment of one thousand five hundred dollars and the amount of the unpaid rent, earnestly insisting that the one thousand five hundred dollars so paid in advance was merely intended as a deposit in the nature of a penalty for any failure on their part to carry out the terms of the lease. "We cannot agree with this contention," said the supreme court of Washington, "without in effect writing a new contract for the parties. In the beginning of the lease the parties have declared that the lease is given in consideration of the covenants of the second parties and of the payment of one thousand five hundred dollars. The lease was certainly a legally sufficient consideration for the payment. If there had been no further mention of this money, there could be no question of the respondent's ownership of it. Does the added stipulation that this payment shall, in the event of full performance of the contract by the second parties, 'be credited in payment of the rent for the last two months of said term, but otherwise said payment this day made shall belong to the first parties as a part of the consideration to them for the execution of this lease' change the nature of this payment from consideration to penalty? We think not. It is declared to be a part of the consideration in the beginning, and this clause reiterates the same thing. In both instances the ownership of the respondent therein is affirmed. This is not changed by his agreement to apply this sum in payment of the rent for the last two months of the terms in the event of the appellants fully performing their contract. It was only by that performance that they could assert any claim upon this money. They must earn it."

"Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease

for the default of the lessee as provided for in the lease." (16 R. C. L. 931.)

A case bearing directly on this phase of the question which we are now considering is *Galbraith v. Wood*, *supra*, where the supreme court of Minnesota was called upon to determine the status of a payment made upon the execution of a lease under circumstances not far dissimilar from the facts in the case at bar. At the time of the execution of the lease there considered the lessee agreed to pay the lessor the sum of twenty thousand dollars "as an advance payment on the rent," which advance he agreed to keep good during the first five years of the lease, with the privilege of reducing the rent at the rate of \$6,666.66 per year for the third, fourth, and fifth years of the term. On motion of defendants the lower court dismissed the action brought by the assignee in bankruptcy of the lessee, after default of the latter, to recover the money so deposited, and in which it was contended that the fund was but a guaranty for the payment of rent to be made by the lessees during the terms of the lease. On appeal the higher court held that the claim of plaintiff, that the money was deposited as security, was not sustained by the pleadings or evidence, and also found a lack of anything in the pleadings or evidence to support its claim that the money was paid as a bonus or independent consideration to induce the making of the lease. It was decided that it was no more than an advance payment of rent, and affirmed the ruling of the lower court.

It requires but a short mathematical calculation to demonstrate that it would be improper to hold that the three thousand dollar fund under consideration here may be regarded as an advance payment for the rent of the leased premises for the last five months of the term, which was for the full period of ten years, at the agreed monthly rental of \$875 per month for the first five years (no rent being charged for the first month), and \$925 for four years and seven months. The credited rent is the exact amount specified in the lease, to wit, one hundred and two thousand five hundred dollars. At the rate of \$925 per month, the rent for the last five months of the term for which no rent is otherwise provided would aggregate \$4,625. The sum of three thousand dollars at four per cent per annum, compounded annually for ten

years, the term of the lease, would approximate just about that amount. Furthermore, the stipulation in the lease that the lessor will repay to the lessee the sum of three thousand dollars, with interest, on the date of the completion of the building, is effective only in the event of the termination of the lease prior to the expiration of the ten-year term thereby demised, for any reason or cause, *except a breach of covenant by the lessee* (the italics are ours), and the stipulation further provides that if such termination shall occur during the last five months of said term, the amount so repayable shall be reduced at the rate of \$925 per month, for each of said months as shall have expired prior to said termination.

[3] From the facts of the present case, and our review of the foregoing authorities, we reach the conclusion that plaintiff in this action is not entitled to recover any portion of the fund of three thousand dollars paid at the time of the execution of the lease. If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor (*Ramish v. Workman, supra*; *Dutton v. Christie, supra*); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it. (*Galbraith v. Wood, supra*. See, also, citations under this case, found in 50 L. R. A. (N. S.) 1034; Ann. Cas. 1915B, 609, 613.)

An examination of the authorities cited by appellant bearing on this point of the case, and its allied questions, discloses that they were dealing with instances in which the money sought to be recovered was deposited as security for the payment of rent, and the performance of the conditions and covenants of the lease, and, in our view, they are not in point as applied to the lease we are called upon to construe in this case.

[4] Appellant also asks for a reversal of the judgment in the case at bar upon the contention that defendant, upon the terms of the lease, had agreed to make repairs which we have before referred to, and had failed and refused to do so; and that as they were made by plaintiff, she had a right to recoup her losses of money in making such repairs from the rent of the premises as it became due. The stipulation of the lease, however, is that the lessor, at her own cost and expense, shall repair, or cause to be repaired, any defects in said premises due to construction which shall appear during the first twelve

months after the completion and acceptance of said building. The building was completed and accepted on or about the thirty-first day of December, 1910, and no notice of any defects was given until January, 1913. By the terms of the lease, therefore, the lessor was not obligated to make such repairs. As to other work claimed by plaintiff to have been done by her in repairing the building, it appears not to have been performed until nearly one year and five months after the completion of the building. Plaintiff contends that she was called upon to make certain necessary repairs during her occupancy of the building, which it was the duty of the defendant to make.

"If it be assumed that under ordinary circumstances the defendant should be credited with such an expenditure as a payment on account of the rent, provided such expenditure was not greater than one month's rent of the premises, in view of the provisions of section 1942 of the Civil Code, the complete answer to any such claim in this case is to be found in the provisions of the lease, whereby the lessee 'hereby waives all rights to make repairs of said premises at the expense of the lessor as provided in section 1942 of the Civil Code of the state of California.' " (*Arnold v. Krigbaum*, 169 Cal. 147, [Ann. Cas. 1916D, 370, 146 Pac. 424].)

It follows, therefore, that the action of the trial court in striking out much of plaintiff's evidence, and in refusing to admit other evidence relative to these repairs, was proper. The court was correct in its action in denying the motion for a new trial.

The judgment is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on October 2, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 28, 1919.

All the Justices concurred.

[Civ. No. 2997. First Appellate District, Division One.—September 2, 1919.]

**ROGERS BROTHERS COMPANY et al., Respondents, v.
JOHN H. BECK et al., Appellants.**

- [1] **STREET LAW—ACTION TO FORECLOSE LIEN—ADMISSION OF ASSESSMENT, DIAGRAM, AND WARRANT—SUFFICIENCY OF FOUNDATION.**—In an action to establish and foreclose the lien of a street assessment, the production of a witness who testified that he was one of the employees of the city clerk of the city in which said street improvement had been done, and who in that capacity produced and fully identified the records containing the assessment, warrant, and diagram of the street superintendent of the city, and further testified that these were to his knowledge part of the official records of said street superintendent's office, and that they were kept in the city clerk's office, was sufficient to furnish the requisite foundation for the introduction in evidence of such records.
- [2] **ID.—ALLEGATION OF CORPORATE EXISTENCE—INSUFFICIENT DENIAL—PROOF UNNECESSARY.**—In such action, the plaintiffs having alleged that they were corporations duly organized and existing under and by virtue of the laws of the state of California, the denial of such allegation based on the want of information and belief upon the subject was insufficient and amounted to an admission of the alleged fact; hence no evidence was required to prove such averment.
- [3] **ID.—REFUSAL OF LEAVE TO AMEND ANSWER—DISCRETION NOT ABUSED.**—In such action, it was not an abuse of discretion to refuse the defendants leave to file an amended answer during the progress of the trial of the case, and more than ten months after the filing of their answer, where no sufficient reason was given for the delay.
- [4] **ID.—APPEAL—INSUFFICIENT RECORD.**—Where leave to file an amended answer during the progress of the trial of a case is refused, but the record on appeal does not contain a copy of the proposed amended answer, the appellate court has no means of knowing its contents, and hence cannot determine whether or not the trial court should in any event have permitted it to be filed, nor whether its refusal to do so was error.
- [5] **ID.—UNFAIRNESS AND FRAUD IN DOING WORK—PLEADING—EVIDENCE.**—Where, in an action to establish and foreclose the lien of a street assessment, the only unfairness or fraud alleged in the answer of the defendants related solely to the progress of the work and had reference to matters which were properly the subject of correction by appeal to the city council, whose decision, in the absence of fraud on the part of said council or its mem-

bers in the hearing of said appeal or the rendition of such decision, is final and conclusive upon the parties entitled to take said appeal, the court did not commit error in sustaining the plaintiffs' objection to questions or proofs offered by the defendants in an endeavor to show fraud in the doing of the public work upon which the assessment in question was predicated.

APPEAL from a judgment of the Superior Court of Imperial County. W. H. Thomas, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

James E. O'Keefe and C. H. Van Winkle for Appellants.

Crouch & Crouch for Respondents.

RICHARDS, J.—This appeal is from a judgment based upon a verdict in the plaintiffs' favor in an action to establish and foreclose the lien of a street assessment.

The appellants make several points upon appeal. [1] The first of these consists in their contention that the trial court erred in overruling their objection to the introduction in evidence of the assessment, diagram, and warrant of the street superintendent upon the ground that no proper foundation had been laid for their introduction. The plaintiffs have produced a witness who testified that he was one of the employees of the city clerk of the city of Imperial, in which said street improvement work had been done, and who in that capacity produced and fully identified the records containing the assessment, warrant, and diagram of the street superintendent of the city, and who further testified that these were to his knowledge part of the official records of said street superintendent's office, and that the said records were kept in the city clerk's office. This testimony was entirely sufficient to furnish the requisite foundation for the introduction in evidence of these records. It is not necessary for the legal custodian of a public record in every case to be present in court to identify it. This may be done by any witness who can speak from his own knowledge in identifying the documents as the official records of the office from which they are produced, as such, and hence the ruling of the court was proper in admitting the assessment, diagram, and warrant in question in evidence.

[2] The next contention of appellants requiring attention is that the offered proof of the fact that the plaintiffs, Rogers Bros. Company and O. & C. Construction Company, were corporations was insufficient, but this objection is without merit, for the reason that the corporate existence and character of these two plaintiffs were alleged to be that of corporations organized and existing under and by virtue of the laws of the state of California. The defendants' denial of these averments was based on the want of information and belief upon the subject. This was an insufficient denial, and amounted to an admission of the alleged fact; hence no evidence was required to prove these averments of the plaintiffs' complaint. (*Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, [105 Pac. 130]; *Mulcahy v. Buckley*, 100 Cal. 487, [35 Pac. 144]; *Mullally v. Townsend*, 119 Cal. 47, [50 Pac. 1066].)

[3] The next contention of the appellants is that the trial court committed an abuse of discretion in refusing the defendants leave to file an amended answer during the progress of the trial of the case. This action was commenced on January 3, 1915; the answer of the defendants was filed on March 5, 1915; the cause came on for trial on January 17, 1916. The amended answer was not proffered for filing until the trial of the cause had proceeded up to the point where the plaintiffs had fully put in their case. No sufficient reason was given for the defendants' delay in seeking to amend their answer, and this of itself would have been a sufficient ground for the court's refusal to permit the same to be filed. [4] But aside from this, the record herein does not embrace a copy of the proposed amended answer, and this court has no means of knowing its contents, and hence cannot determine whether or not the trial court should in any event have permitted it to be filed, nor whether its refusal to do so was error.

[5] The next contention of the appellants is that the trial court was in error in sustaining the objection of the plaintiffs to questions asked or proofs offered by the defendants in an endeavor to show fraud in the doing of the public work upon which the assessment in question is predicated. In so far as these questions asked or proof offered were based upon the averments of the original answer of the defendants herein we are satisfied that no foundation is therein laid for the introduction of such evidence, since the only unfairness or

fraud therein alleged relates solely to the progress of the work, and has reference to matters which are properly the subject of correction by appeal to the city council, whose decision, in the absence of fraud on the part of said council or its members in the hearing of said appeal or the rendition of such decision, is final and conclusive upon the parties entitled to take said appeal. (*Girvin v. Simon*, 116 Cal. 604, [48 Pac. 720]; *McLaughlin v. Knobloch*, 161 Cal. 676, [120 Pac. 27]; *Lambert v. Bates*, 137 Cal. 676, [70 Pac. 777].)

In so far as the appellants' contention as to the existence of fraud on the part of the city council or its members in the hearing or determination of said appeal is concerned, it may be stated that possibly such an issue was presented by the amended answer which the defendants vainly sought to file; but since the said amended answer has not been embraced in the record before us, we are unable to say whether such an issue was so tendered, and hence cannot determine whether the court was in error in its refusal to admit such offered proofs.

No question being presented, the judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 3004. First Appellate District, Division One.—September 2, 1919.]

PETER JOHNSON, Respondent, v. HEDVIG NELSON
et al., Appellants.

- [1] **EXECUTIONS—PREMATURE MOTION TO SET ASIDE RETURN OF SALE—RIGHT TO RENEW MOTION.**—In an action to foreclose a mortgage, an order denying a motion, made prior to the return of sale by the sheriff, to vacate such return and directing a new order of sale to be issued, does not render the matter *res adjudicata* as to a second motion made for the same purpose after such return of sale has been made.
- [2] **ID.—RES ADJUDICATA—DOCTRINE NOT APPLICABLE TO MOTIONS.**—The doctrine of *res adjudicata* does not apply to motions, the matter of their renewal being in the discretion of the trial court.

2. Rule of *res adjudicata* as applicable to motions in pending action, note, Ann. Cas. 1914D, 974.

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[3] **ID.—UNSATISFACTORY RETURN BY SHERIFF—SETTING ASIDE EX PARTE.**—A trial court, having had brought to its attention that the sheriff, as its officer, has made an equivocal and unsatisfactory return upon an order of sale issued to him in an action to foreclose a mortgage, and that the same was unsatisfied, has full power *ex parte* to set aside such return and direct a new order of sale to be issued and executed.

APPEAL from an order of the Superior Court of Los Angeles County setting aside a sheriff's return of sale and directing a new order of sale to be issued. Pat R. Parker, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

John F. Poole and Wm. Lewis for Appellants.

Charles J. Kelly and D. A. Stuart for Respondent.

RICHARDS, J.—This is an appeal from an order made after final judgment setting aside a sheriff's return of sale for the foreclosure of a mortgage and directing a new order of sale to be issued.

The facts are undisputed and are as follows: The mortgage was duly foreclosed and a decree of sale of the mortgaged premises made and entered, and an order of sale duly issued thereon and placed in the hands of the sheriff for execution. On the day on which the sale was advertised to take place the plaintiff and also one of his attorneys were present at the time and place of sale; the plaintiff personally made a bid of an amount somewhat less than the total sum then due. His attorney also on his behalf made a bid of the total sum due. There were no other bidders. A misunderstanding arose between the sheriff and the plaintiff as to the sum actually bid, the sheriff insisting that he had struck off the property for the amount of the plaintiff's personal bid. Thereupon, and before the sheriff had made any return of sale, the plaintiff moved the court for an order vacating and setting aside the sale. When this motion came on for hearing, the sheriff not yet having made his return of sale, the court denied the motion. Thereafter the sheriff made his return of sale which, while reciting the fact that the property was sold, returned the order of sale as wholly unsatisfied.

Thereupon the plaintiff moved the court to set aside this return of sale and direct a new order of sale to be issued. Upon the hearing of this motion the court granted the same, and from its order to that effect this appeal has been taken.

[1] The first point urged by the appellants is that the trial court had no jurisdiction to make the order appealed from, for the reason that the first order of said court denying the plaintiff's motion to vacate the sheriff's return of sale rendered the matter *res adjudicata*, and hence the court had no power to grant the plaintiff's second motion to set aside the return of sale. The point is utterly without merit for two reasons: First, that the two motions are dissimilar in the important respect that at the time the plaintiff's first motion was made no return of sale had yet been made by the sheriff, and the motion was therefore premature and doubtless was denied for that reason; while said return of sale was on file when the second motion was made, presenting an entirely different situation to the trial court; [2] and the second reason why the point is without merit is that under the settled practice in this state the doctrine of *res adjudicata* does not apply to motions, the matter of their renewal being in the discretion of the trial court. (*Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 279; *Johnston v. Brown*, 115 Cal. 694, [47 Pac. 686]; *Gay v. Gay*, 146 Cal. 237, [79 Pac. 885].)

The next contention of the appellants is that the court was in error in granting the motion in question because all of the proper parties to the action had not been served with notice of the motion. This appeal has been taken by a number of persons other than the original mortgagor and main defendant in the action. The record before us does not contain any of the pleadings or proceedings in the case prior to the making and entry of the decree of foreclosure, and we have, therefore, no means of knowing except from the terms of said decree who the defendants in the action were, or what issues were presented by them, or in what way any of them may have been interested in the proceedings in the case subsequent to the entry of the decree of foreclosure and issuance of the order of sale. The record before us, however, discloses that a number of these appealing defendants appeared upon the hearing of said motion to set aside the sheriff's return of sale, and at that time made no objection that they themselves had

not been duly served with notice of said motion, and only objected because some other unnamed and unidentified defendants had not been served with such notice. The only evidence offered in support of said objection was the original notice of trial of the cause, which showed that there were quite a number of defendants who had at that time been served with such notice; but as to what interest they may have had in the case, particularly after the final decree of foreclosure, we are left entirely in the dark. In a word, it is nowhere made to appear how these defendants have been injuriously affected by the fact that some defendants other than themselves and whose interest is not disclosed were not served with notice of the motion to set aside the sheriff's return of sale.

[3] In addition to the foregoing considerations the fact that trial courts have control of their process, and that the trial court in this particular case, upon having brought to its attention the fact that the sheriff, as its officer, had made an equivocal and unsatisfactory return upon the order of sale which had been issued to him, and that the same was unsatisfied, would have had full power *ex parte* to set aside such return and direct a new order of sale to be issued and executed, brings this case perilously near the point of being a frivolous appeal.

No error appearing upon the face of the record before us the order is affirmed.

Waste, P. J., and Bardin, J., *pro tem.*, concurred.

[Civ. No. 2987. First Appellate District, Division One.—September 2, 1919.]

JOSEPH B. MORGAN, etc., et al., Respondents, v. HORACE P. DIBBLE et al., Appellants.

[1] VENDOR AND VENDEE—ACTION FOR SPECIFIC PERFORMANCE—CONTRACT OF SALE INEQUITABLE—RELIEF.—In this action to revise and specifically perform an agreement for the sale and purchase of real property, and for damages in the event specific performance could not be had, the court having found that the land agreed to be sold to defendant was worth less than the sum agreed to be paid, and the contract therefore inequitable, was correct in

denying plaintiffs a decree in specific performance. Such a decree cannot be supported in the absence of a finding that the contract was just and reasonable, and the consideration adequate.

- [2] **ID.—RECOVERY OF DAMAGES.**—While there are contracts, perfectly valid, which a court of equity will not set aside for any unfairness, but which are so unfair that specific performance will not be decreed, the party being left to his remedy at law, an action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established; therefore, in this action, the trial court having determined that plaintiffs were not entitled to a decree in specific performance, judgment for damages should not have been entered against the defendants.
- [3] **ID.—BREACH OF CONTRACT TO PURCHASE REAL PROPERTY—DAMAGES—IMPROPER ITEMS.**—The measure of damages for the breach of an agreement to purchase an estate in real property, as prescribed by section 3307 of the Civil Code, does not include such items as cost of certificate of title to the land, commission for obtaining the loan covered by the first mortgage which was agreed to be assumed by the defendants, or the agent's commission for making the sale.
- [4] **ID.—PROVISION WITH REFERENCE TO MORTGAGES—CONTRACT TOO UNCERTAIN.**—A contract for the sale and purchase of real property containing a provision that the purchasers "shall assume a first mortgage of five thousand dollars due on or before five years from date, it being further understood that no payment shall be made on the principal until at least one year shall have elapsed, and any payment shall be made on any regular interest pay-day. Interest on said \$5,000 to be at the rate of 8% payable semi-annually," and, further, that the purchasers shall "assume a second mortgage" made payable to a given individual of \$19,700, payable on or before ten years from date, interest payable at 7% per annum payable semi-annually, is not sufficiently definite and certain to support an action in specific performance.
- [5] **ID.—RIGHT OF WAY FOR PIPE-LINE—PROVISION INDEFINITE.**—A provision in such contract that the vendors shall "give a right of way for a pipe-line from Fifth St. over the eastern boundary of five acre Lot 3," is so indefinite as to amount to no covenant at all.
- [6] **ID.—OPTION PROVISION UNCERTAIN.**—A provision in such contract that "this agreement includes an option by which" the vendors "may purchase lot 6 of block 145 during the next six months for

the sum of four thousand dollars to be deducted from the second mortgage," is likewise uncertain.

- [7] **ID.—ESCROW INSTRUCTIONS AS PART OF AGREEMENT.**—In this action to revise and specifically perform an agreement for the sale and purchase of real property, the instruction prepared by the title company which the parties directed it to use as its "instructions for this exchange," constituted neither a separate agreement of sale nor a supplemental part of the first agreement.
- [8] **ID.—PERFORMANCE OF CONDITIONS BY VENDORS — UNSUPPORTED FINDING—EVIDENCE.**—In this action the finding of the lower court that plaintiffs had performed, or were in position to perform, all the terms of the contract imposed on them, was not supported by the evidence, which showed that the first mortgage on the ranch executed by plaintiffs was not for the term provided in the agreement, that their land was subject to public easements which could not be removed, and that they executed a lease on the property extending beyond the time when the exchange was to be made.
- [9] **ID.—AGREEMENT TO MAKE GOOD TITLE—KNOWLEDGE OF RIGHTS OF WAY—WAIVER OF FULFILLMENT.**—Where the vendors were in express terms obligated to make good title (except as to encumbrances specified), as a condition of sale, even actual knowledge by the purchasers of the true status of the rights of way would not, while the contract remained executory, be deemed to imply a waiver of substantial fulfillment of the condition for title.
- [10] **ID.—INABILITY OF VENDORS TO PERFORM—RIGHT OF VENDEES TO RESCIND.**—Where, at the time of the execution of the sale and at the time when it should have been performed, the title to the vendors' land was incurably defective by reason of public servitudes, a cloud which in the nature of things they could not remove by ordinary methods of business negotiation, the purchasers were entitled to rescind at any time.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge. Reversed.

The facts are stated in the opinion of the court.

Leroy A. Wright and Thomas D. McLean for Appellants.

Henry A. Hunter for Respondents.

WASTE, P. J.—This is an action to revise and specifically perform an agreement for the sale and purchase, or, more properly speaking, an exchange, of real estate, and for damages, in the event specific performance cannot be had. Plaintiffs, so they allege, agreed to sell, and the defendants agreed

to buy, a tract of land in Imperial County, and certain shares of stock of Imperial Water Company, No. 1, located on said land and appurtenant thereto, for the sum of thirty thousand seven hundred dollars. As part payment of the purchase price the defendants agreed to convey to plaintiffs real property in San Diego County, which plaintiffs agreed to accept at the mutually agreed price of six thousand dollars. As another part payment of the purchase price defendants agreed to assume a first mortgage of five thousand dollars, payable on or before August 1, 1914, with interest at the rate of eight per cent per annum, payable semi-annually, which plaintiffs agreed to execute upon the Imperial County property. As the balance of the purchase price the defendants agreed to assume a second mortgage on the same property, made payable to Bert Morgan, one of the plaintiffs, in the sum of nineteen thousand seven hundred dollars, payable on or before ten years from date, with interest at the rate of seven per cent, payable semi-annually.

The contract was to be performed within sixty days from its date.

The contract contained a stipulation that the Imperial Valley ranch should be free and clear of all encumbrances, other than the two mortgages just noted, except the last installment of taxes for the fiscal year 1914-15. In this connection plaintiffs alleged in their complaint that, at the time of the execution of the contract, it was mutually agreed and understood that the Imperial County property should be conveyed by the plaintiffs subject to rights of way then existing thereon, but that, through inadvertence and mistake, the agreement failed to so express the true agreement of the parties.

The plaintiffs alleged their readiness and ability, at all times, and full performance on their part, but that defendants had refused to comply with the terms of the agreement; that the consideration for the agreement was adequate, and the same was, as to the defendants, just and reasonable. The defendants, answering, admitted the execution of the agreement, but denied that it constituted a valid contract of sale; denied that the right of way clause was the result of mistake or inadvertence; denied performance on the part of the plaintiffs; and denied that the consideration for the agreement as to them was adequate, or

that the contract was reasonable or just. It was alleged in the answer that the minds of the parties never met in the execution of the agreement; that it had been abrogated by other proposals and offers, never accepted by defendants; that plaintiffs by their acts had worked a rescission of the contract, which, it was further alleged, had been obtained by fraud, and misrepresentation, as to the value of the Imperial Valley ranch, the character and nature of its surface, and of its soil, and its adaptability for irrigation and subdivision purposes.

The trial court found that the contract of sale was made as alleged by plaintiffs, and that subsequently an agreement supplemental to and a part of the original contract was entered into by the parties. In its findings it construed the two agreements together and thereafter refers to them as the "agreements." This supplemental agreement will be referred to hereafter as the "escrow instructions." The court made no finding on the issue raised by the pleadings as to the mistake alleged to have been made in the original contract relative to the rights of way, but did find that the assent of the defendants to the agreements was not obtained by the misrepresentation of the plaintiffs, nor under the influence of any mistake. It further found that the plaintiffs had performed, or offered to perform, all on their part to be done, and that they at all times had been ready, willing, and able to so do, but that defendants had on their part refused. The sufficiency of the evidence to support these findings will be considered later.

Continuing, the court found that "defendants herein have received an adequate consideration for said agreements, and that said agreements were and now are as to said defendants just and reasonable." After other declaration of facts, the court then finds: "That the land agreed to be sold, and purchased by said defendants, under said agreements, was, and is, worth a sum less than the sum of thirty thousand dollars, as specified in said agreements, and that said price is excessive, and the contract inequitable, and that on account, and solely by reason thereof, specific performance should be denied to plaintiffs." These findings are fatally inconsistent.

The court also found that plaintiffs, relying on the agreements entered into between themselves and defendants, had,

"in order to fulfill their part of said contract, necessarily incurred certain expenses, as follows": certificate of title to their land, \$150; commission for obtaining the loan, covered by the first mortgage to be assumed by defendants, one hundred dollars; and for the agent's commission for making the sale, or exchange of the property, one thousand two hundred dollars, all to their damage in the sum of \$1,450. As conclusion of law the court found that plaintiffs were not entitled to specific performance, but were entitled to judgment against defendants, and each of them, for the sum of \$1,450, and costs of suit. Such judgment was thereupon entered and defendants appeal. No appearance was made in this court on the part of respondents, and no brief has been filed in their behalf, although the transcript on appeal was filed February 1, 1917, and appellant's opening brief was filed within thirty days thereafter, as required. Such palpable neglect on the part of those supposedly interested, in the matter in litigation, leads us to assume that they have no faith in the righteousness of the judgment secured by them in the lower court. Our examination of the record lends confirmation to this conclusion.

[1] The trial court having found that the land agreed to be sold to defendants was worth less than the sum agreed to be paid, and that the price of thirty thousand dollars was excessive, and the contract therefore inequitable, was correct in denying plaintiffs a decree in specific performance. Such a decree cannot be supported in the absence of a finding that the contract was just and reasonable and the consideration adequate. (Civ. Code, sec. 3391; *Gibbons v. Yosemite Lumber Co.*, 172 Cal. 714, 716, [158 Pac. 196].)

[2] Appellants contend that under the findings the court should not have awarded the plaintiffs damages. There are contracts, perfectly valid, which a court of equity will not set aside for any unfairness, but which are so unfair that specific performance will not be decreed. (*White v. Sage*, 149 Cal. 613, 615, [87 Pac. 193].) In such cases the party is left to his remedy at law. (*Agard v. Valencia*, 39 Cal. 292, 302; *Prince v. Lamb*, 128 Cal. 128, 129, [60 Pac. 689].) The right to pecuniary compensation in lieu of specific performance "assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case

in chancery." (*Milkman v. Ordway*, 106 Mass. 232, 254.) There is no authority for holding that equity can grant damages unless some case of equitable relief is made out also, to which the damages would be applicable or subsidiary. (*Bourget v. Monroe*, 58 Mich. 563, 566, [25 N. W. 814].) An action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established. (*Cooley v. Lobdell*, 153 N. Y. 596, 603, [47 N. E. 783].) A court of equity will not grant pecuniary compensation, in lieu of specific performance, unless the case presented is one for equitable interposition. (*Marks v. Gates*, 154 Fed. 481, [12 Ann. Cas. 120, 14 L. R. A. (N. S.) 317, 321, 83 C. C. A. 321].) "In other words, the ancillary power to award compensatory damages can only be exercised in a case where the equitable relief prayed for might have been given." (*Clark v. Rosario Mining & Milling Co.*, 176 Fed. 180, 189, [99 C. C. A. 534].) Judgment for damages, therefore, should not have been entered against the defendants. [3] Furthermore, the items of the damages, included in the court's findings, as the basis for the judgment, do not fall within the provisions of section 3307 of the Civil Code, which provides the measure of damages caused by breach of an agreement to purchase an estate in real property.

[4] The original agreement of sale falls short of the requirements necessary to support an action in specific performance, which can only be granted when the contract is definite and certain. (*Meyer v. Lincoln Realty Co.*, 14 Cal. App. 756, 757, [113 Pac. 333]; *Minturn v. Baylis*, 33 Cal. 129.) It is not definite and certain in all its terms. The agreement provides that the defendants shall "assume a first mortgage of five thousand dollars due on or before five years from date, it being further understood that no payment shall be made on the principal until at least one year shall have elapsed, and any payment shall be made on any regular interest pay-day. Interest on said \$5,000 to be at the rate of 8% payable semi-annually," and, further, the defendants shall "assume a second mortgage made payable to Bert Morgan of \$19,700. payable on or before ten years from date interest payable at 7% per annum payable semi-annually." While, as was said in *Carr v. Howell*, 154 Cal. 372, 378, [97 Pac.

885, 888], "the fact that mortgages sometimes or even usually contain other terms and covenants than here presented does not render the contract uncertain," we are of the opinion that there is such a dearth of facts in the contract here under consideration, relative to the property, included in the mortgages, the parties to whom and by whom executed, whether already executed or to be executed, the terms of the notes or other evidence of indebtedness, to be given, if any, the matter of partial payments, and whether said mortgages did actually or were to date from the date of their execution, or from the date of the contract, as to render the contract uncertain in that particular.

[5] The provision in the contract that the plaintiffs shall "give a right of way for a pipe-line from Fifth St. over the eastern boundary of five acre Lot 3" is so indefinite as to amount to no covenant at all. [6] The further stipulation that "this agreement includes an option by which" plaintiffs "may purchase Lot 6 of Block 145 during the next six months for the sum of Four Thousand Dollars to be deducted from the second mortgage," is likewise uncertain.

[7] The document which the parties direct the abstract company to use "as your instructions for this exchange" cannot, in our judgment, be considered as a separate agreement of sale, or a supplemental part of the first agreement. The instructions were prepared by the title company, according to the evidence of plaintiff J. B. Morgan, "for the purpose of carrying out the contract," and in express terms "relate back to date of August 1st to correspond with a certain agreement of sale and purchase made and entered into on said last-mentioned date between the parties hereto." They were not signed by respondent Joseph B. Morgan until some time after the expiration of the sixty-day period within which the contract of sale, or exchange, could be consummated, and after the respondents had withdrawn their deed and certificate of title from the escrow. The respondents and he had utterly failed to reach an agreement respecting a number of matters connected with the transaction, which they had made subject to treaty and further negotiation after the signing of the original agreement. His object in signing the instructions appears to have been the result of a belated attempt to put defendants in default for failing, as plaintiffs at first con-

tended, and alleged in their original complaint, to carry out the terms of the escrow instructions.

The plaintiffs abandoned all reliance on the escrow instructions, as a contract of sale, or exchange, very early in the case. In their amended complaint on which they went to trial they omitted all reference to it, and relied solely on the original agreement. During the trial they sought and secured its introduction in evidence in order "to show that the escrow instructions mention the rights of way, and that defendants had actual knowledge of their existence." It was not until the lower court intimated that it would grant the motion of defendants for a nonsuit that plaintiffs asked and were granted permission, we think improperly, to set it up by an amendment to their complaint. From all the evidence the court should have granted the motion for the nonsuit.

[8] Appellants also contend that the finding of the lower court, that plaintiffs had performed, or were in position to perform, all the terms of the contract imposed on them is not supported by the evidence, and that in fact plaintiffs could not perform, because of the following facts: That the first mortgage on the Imperial Valley ranch executed by plaintiffs was not for the term provided in the agreement; that their land was subject to public easements which could not be removed, and that the plaintiffs executed a lease on the property extending beyond the time when the exchange was to be made. We think this contention of appellant must also be upheld.

After the respective parties had each visited and inspected the other's land, they met to discuss the details of the exchange. The agreement was there read and explained, "taking each line at a time." All parties being satisfied therewith, it was signed and deposited with an abstract company, together with certain escrow instructions, signed by all the parties, excepting Bert Morgan, one of the plaintiffs, who did not affix his signature thereto within the sixty days allowed for performance of the contract, and until long after a serious disagreement had arisen between the parties, and according to appellant, after there had been a mutual rescission of the contract. Plaintiffs also executed and deposited with the abstract company a first mortgage on their property for five thousand dollars in favor of one George Birkett, but payable in three instead of five years, as required in the contract. The trial court found, and the evidence satisfies us, that this

departure from the original stipulation was agreed to by defendants.

In the original contract, as before stated, the stipulation relating to title to plaintiffs' property is that it is to "be free and clear of all other encumbrances" than the two mortgages specified and taxes for the fiscal year 1914-15. In the escrow agreement the stipulation is that it shall be free from all encumbrances other than taxes, and the mortgages provided for in the contract of sale except: "2. The rights of way for roads, ditches and canals now of record." About ten acres of the land were shown by the evidence to be covered by rights of way for a railroad, a canal system and county roads. Appellants contend that nowhere in the record does it appear that these rights of way were ever recorded. This appears to be so. Our examination and conclusion in this regard is confirmed by the statement of the lower court made during the trial. If the lower court, in deciding the case, was proceeding on the theory that the defendants had actual notice of these easements, it seems to have overlooked its own opinion, expressed during the trial, that such was not the case, particularly as to the railroad and parts of the county roads. Plaintiff Bert Morgan testified he did not call the attention of the defendants to these easements before the agreements were entered into. The evidence indicates that defendants did not know of the extent and location of these easements until about the time of the trial. [9] Since the respondents were in express terms obligated to make good title (except as to encumbrances specified), as a condition of sale, even actual knowledge by the purchasers of the true status of the rights of way would not be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. (*Snowden v. Derrick*, 14 Cal. App. 309, 314, [111 Pac. 757]; *Prentice v. Erskine*, 164 Cal. 446, 450, [129 Pac. 585].) [10] At the time of the execution of the contract of sale, and when it should have been performed, the title to plaintiff's land was incurably defective by reason of the public servitudes, a cloud which in the nature of things plaintiffs could not remove by ordinary methods of business negotiation. Defendants could have rescinded at any time. (*Prentice v. Erskine*, 164 Cal. 446, 449, [129 Pac. 585].)

This defect in the vendor's title made it impossible for the plaintiffs to perform.

Plaintiffs, after the agreements with defendants were entered into, also executed a lease of their land and delivered possession thereunder to third parties, who continued in such occupancy and were on the land at the time of the trial of the action. The time within which possession might be regained by plaintiff was a matter of some conjecture, depending upon the action of the lessees in possession.

Plaintiffs were, therefore, not in position to, and were never able to, perform their contract. The finding of the trial court to the contrary is not supported by the evidence.

The judgment is reversed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 3002. First Appellate District, Division One.—September 3, 1919.]

AMERICAN TRUST AND BANKING COMPANY (a Corporation), Appellant, v. **UNION SECURITY COMPANY** (a Corporation), Respondent.

L. P. LOWE, Intervener, Cross-complainant and Respondent, v. **AMERICAN TRUST & BANKING COMPANY** (a Corporation), Cross-defendant and Appellant; **UNION SECURITY COMPANY** (a Corporation), Cross-defendant and Respondent.

- [1] **CORPORATIONS—PLEDGE OF STOCK—ENTRY OF TRANSACTION UPON CORPORATION BOOKS—RIGHTS OF PLEDGEE.**—A person who acquires stock in pledge has the right to compel the corporation to cause the nature of the transaction to be so entered upon its books as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer.
- [2] **ID.—INDORSEMENT AND DELIVERY OF CERTIFICATE—VALIDITY OF TRANSFER.**—Under section 324 of the Civil Code, as interpreted by the supreme court, a transfer of stock by indorsement and delivery of the certificate is valid against all but innocent purchasers and transferees in good faith for value, and without notice. Actual notice to such an intending purchaser by one having a prior claim upon the stock, even though his claim be not noted in the books of the corporation, is sufficient.
- [3] **ID.—PURCHASE OF STOCK AT EXECUTION SALE—WANT OF NOTICE OF PRIOR ASSIGNMENT AS PLEDGE—RIGHT TO HAVE SHARES RE-ISSUED.**—A purchaser of stock at an execution sale under his own judgment, without actual or constructive notice of the previous

assignment of such stock by the judgment debtor, in whose name it stands on the books of the corporation, to a third person as security for an antecedent indebtedness, takes the stock discharged of the lien of such pledgee, and is entitled to have the certificate of such shares reissued to him as such purchaser. He is a *bona fide* purchaser in good faith, for value, and without notice.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

Gray, Barker & Bowen, Donald Barker and Arthur R. Smiley for Appellant.

Swanwick & Donnelly for Respondent Union Security Company.

Goodwin & Morgrage for Respondent L. P. Lowe.

WASTE, P. J.—Plaintiff brought this action against the Union Security Company, seeking to compel defendant to enter a transfer of certain shares of its own stock upon its books, showing ownership therein in plaintiff, and to issue to plaintiff a certificate therefor. From the chronological statement of the facts, it appears that one Brown, the owner of seventy shares of the capital stock of defendant, Union Security Company, indorsed a certificate of this stock, and delivered it to the plaintiff as a pledge and security for an obligation held by plaintiff against the corporation, of which Brown was president. Plaintiff took no steps to have the records of the Union Security Company show the transfer or its interest in the said stock as pledgee until long after the rights of intervener and cross-complainant Lowe had attached to said stock as hereinafter stated.

After the delivery of the stock certificate and pledge, one Randall commenced an action in the superior court of Los Angeles County against Brown, and caused an attachment to be regularly issued and levied upon the said seventy shares of stock, then standing in the name of Brown on the books of the Union Security Company. Judgment was entered in this action in favor of Randall against Brown, and execution upon the said judgment was issued and levied upon the said seventy shares of stock still standing in Brown's name on the

books of the company. The sheriff of Los Angeles County duly sold said stock to Randall in satisfaction of his judgment, and delivered a certificate of sale thereof in regular form. Randall had no notice or knowledge of plaintiff's equities in the stock until long after his purchase at the execution sale in satisfaction of the judgment against Brown and receipt of the certificate of sale from the sheriff. He promptly presented this certificate to the Union Security Company, and demanded transfer of the said seventy shares in his name on the books of the company. As the company had no knowledge of any adverse interest in, or claim to, the stock it issued to Randall a certificate for seventy shares of its capital stock, in lieu of said certificate, standing on its books in the name of Brown.

Randall thereafter indorsed and delivered said certificate of stock to Lowe, the intervener, who also took the same without notice.

Some time thereafter the certificate of stock which Brown had delivered as a pledge to plaintiff was sold and assigned to plaintiff in satisfaction of the debt for which it was held as security. Plaintiff presented the certificate with the assignment thereof to the Union Security Company and demanded the transfer of such shares be made to defendant upon the books of said company. The Union Security Company refused to comply with the demand, and plaintiff commenced this action to compel it to do so. L. P. Lowe intervened in the action, and, by cross-complaint against plaintiff and defendant, alleged, in substance, the foregoing facts, which at the trial were stipulated as the facts of the case. Judgment was entered in favor of Lowe, adjudging him to be the owner of the stock. Plaintiff moved for a new trial, which was denied, and now appeals from the judgment.

Succinctly stated, the question for the court on this appeal is, whether or not a *bona fide* purchaser at an execution sale of stock standing in the name of a judgment debtor on the books of the corporation is protected in the purchase against a prior pledgee holding a certificate evidencing said stock as security for an antecedent indebtedness of the judgment creditor. The lower court answered this question, we believe, correctly, in the affirmative.

[1] When plaintiff acquired the stock in question in pledge from Brown, it had a right to compel the Union

Security Company to cause the nature of the transaction to be so entered upon its books as to show the names of the pledgor and the pledgee, and the number or designation of the shares, and the date of the transfer. (*Spreckels v. Nevada Bank*, 113 Cal. 272, 277, [54 Am. St. Rep. 348, 33 L. R. A. 459, 45 Pac. 329].) As was said in that case: "All this may be done to the full protection of the pledgee's rights without the surrender of the certificates, their cancellation, and the issuance to him of new ones, and, when done, the pledgee would be fully protected against a subsequent purchaser, who would be charged with the constructive notice which the entries upon the books of the corporation import; and, upon the other hand, there would be preserved to the pledgor all the rights incident to his ownership under the pledge."

[2] Section 324 of the Civil Code provides that shares of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid except between the parties thereto until same is so entered upon the books of the corporation, as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer; it has been determined by the decisions of the supreme court of this state, interpreting these provisions, that even without entry upon the books of the corporation, such a transfer is valid as against all but innocent purchasers and transferees in good faith for value, and without notice. Actual notice to such an intending purchaser by one having a prior claim upon the stock, even though his claim be not noted in the books of the corporation, is sufficient. (*Spreckels v. Nevada Bank*, *supra*, and cases cited.)

[3] In the case at bar the subsequent purchaser at the execution sale had no actual notice, nor constructive notice, which the entries on the books of the corporation, referred to in the decision just quoted, would have imported. We are of the opinion, therefore, that plaintiff omitted to take an ordinary business precaution as well as to perform its duty when it failed to cause a proper entry of the transaction between itself and defendant's pledgor, Brown, to be entered upon the books of the Union Security Company for its protection, as the section of the code referred to contemplated.

Lowe, as the purchaser at the execution sale under his judgment, without notice of the previous assignment of the

seventy shares of stock to the plaintiff, took the stock discharged of the plaintiff's lien (*Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600), and was entitled to have the certificate of such shares reissued to him as such purchaser. (*West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 316, [85 Am. St. Rep. 171, 65 Pac. 622].)

Lowe, purchasing the stock at a sale under his own judgment, without actual or constructive notice of alleged defects in the title thereof, was a *bona fide* purchaser for value. (*Kady v. Purser*, 131 Cal. 552, at 559, [82 Am. St. Rep. 391, 63 Pac. 844]; *Foorman v. Wallace*, 75 Cal. 552, [17 Pac. 680]; *Hunter v. Watson*, 12 Cal. 377, [73 Am. Dec. 543].) The rule as to a *bona fide* purchaser applies to sales of corporate stock. (*Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359; *Winter v. Belmont Mining Co.*, 53 Cal. 428.) Within the rule announced intervenor Lowe was a *bona fide* purchaser in good faith, for value, without notice.

The judgment is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 28, 1919.

All the Justices concurred.

[Civ. No. 3018. First Appellate District, Division One.—September 3, 1919.]

JOHN NEZIK, Respondent, v. WALTER D. COLE et al.,
Appellants.

- [1] **APPEAL—ALTERNATIVE METHOD—UNDERTAKING.**—Under the new and alternative method of appeal provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907, an undertaking is not required.
- [2] **ID.—PERFECTING OF APPEAL—PREPARATION OF RECORD.**—Under the new and alternative method of appeal, the party aggrieved, in order to perfect an appeal, is only required to file the notice of appeal provided for by section 941b of the Code of Civil Pro-

cedure. Having thus properly taken an appeal, he is not required to have a reporter's transcript of the proceedings made up and prepared as provided by section 953a of the same code, but may cause to be duly prepared and settled a bill of exceptions, containing the usual statement of the matters occurring at the trial, in accordance with section 650 thereof.

- [3] **CORPORATIONS—EXPIRATION OF TERM—DISSOLUTION.**—A corporation is dissolved at the expiration of the term of its corporate existence.
- [4] **ID.—TERM OF CORPORATE EXISTENCE—POWER TO SHORTEN.**—A corporation has power to shorten the term of its corporate existence by an amendment to its articles of incorporation, even if the practical result of such abbreviation amounts to almost an immediate dissolution.
- [5] **ID.—EFFECT OF DISSOLUTION—CAPACITY TO SUE OR BE SUED—ABATEMENT OF PENDING ACTIONS.**—Except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body, or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void.
- [6] **ID.—SECTION 400, CIVIL CODE, CONSTRUED—NECESSITY FOR SUBSTITUTION OF SUCCESSORS OR REPRESENTATIVES.**—Section 400 of the Civil Code does not have the effect of continuing the existence of a corporation after dissolution so as to render it capable of defending actions in its corporate name. It is, therefore, necessary that, if the action continue at all, its successors or representatives, under section 400, be properly brought in on motion, as provided in section 385 of the Code of Civil Procedure.
- [7] **ID.—DISSOLUTION AFTER SERVICE OF PROCESS—INABILITY TO APPEAR—POWER OF COUNSEL TO CONTINUE TO ACT.**—Where, after service of process but prior to appearance, a corporation defendant is dissolved, the subsequent filing of demurrers and answer in its name and purporting to be in its behalf are a nullity; and the action of counsel, who may have had authority to represent such defendant prior to the termination of the period of its legal existence, cannot, so far as that party is concerned, vitalize any

3. Period of existence of private corporation, note, 33 L. E. A. 577.

5. Abatement of action by or against corporation in absence of a saving statute by expiration of charter, note, 32 L. E. A. (N. S.) 446.

proceedings taken in the abated action after the corporation ceases to exist.

- [8] **ID.—DISSOLUTION OF CORPORATION DEFENDANT—HOW BROUGHT TO ATTENTION OF COURT—REMEDY OF PLAINTIFF.**—The dissolution or death of a corporation defendant after service of process but prior to appearance, like the death of any other party to a pending action, can only be brought to the attention of the court on proper suggestion made by someone other than the defunct corporation. If the plaintiff intends to secure a judgment, enforceable against the persons who were the directors of the corporation prior to and at the time it ceased to exist, he should have them substituted under section 385 of the Code of Civil Procedure as parties in place of the corporation, after the latter has become *functus officio*.
- [9] **ID.—AMENDMENT OF PLEADINGS—SUBSTITUTION OF PARTIES—NOTICE.**—The substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed otherwise than to be entered in the minutes of the court.
- [10] **ID.—SUBSTITUTION OF DEFENDANTS—SUBSTANTIAL COMPLIANCE WITH CODE REQUIREMENTS.**—In this action for damages for personal injuries, the notice of motion served on counsel who had represented the corporation defendant prior to the termination of its existence as a legal entity and the order of the court directing that the proposed amended and supplemental complaint be filed and made of record in the case, and further directing that the defendants named in said amended and supplemental complaint, who had been the directors of the corporation prior to and at the time it ceased to exist, have and were given twenty days from date of a service of a copy of such order in which to plead thereto, constituted a substantial compliance with section 385 of the Code of Civil Procedure, and operated to bring about a substitution of said directors as defendants in lieu of the defunct corporation.
- [11] **ID.—SUBSTITUTION OF PARTIES—NOTICE.**—One substituted in a cause must be duly notified of the fact of his being made a party before he can be affected by notices or proceedings in the action.
- [12] **ID.—WANT OF NOTICE OF APPEARANCE—JUDGMENT INVALID.**—Where, after the bringing of the action and the service of process, but prior to appearance, the corporation defendant ceased to exist as a legal entity, and the persons who were the directors of the corporation prior to and at the time it ceased to exist as a legal entity were substituted as defendants in lieu thereof, but there was no service upon or authorized appearance by or in behalf of such substituted defendants, the default entered in the action against them was unauthorized, and the judgment entered thereon void.

APPEAL from a judgment of the Superior Court of Inyo County. Wm. D. Dehy, Judge. Reversed.

The facts are stated in the opinion of the court.

Thomas, Beedy & Lanagan for Appellants.

Edmon G. Bennett, Chas. E. Barrett, W. A. Lamar and Platt & Sanford for Respondent.

WASTE, P. J.—Appeal from a judgment, entered after default, awarding damages in the sum of \$17,688 for personal injuries.

Within the time when an appeal may be taken appellants filed with the clerk of the court in which the judgment was entered a notice stating the appeal from the same and served a similar notice on the attorneys for the adverse party. They did not, however, within five days after service of the notice of appeal, file the undertaking, or, in lieu thereof, make the deposit of money with the clerk as required by sections 940 and 941 of the Code of Civil Procedure, and no waiver of the same was ever made or filed. Neither did appellants, in lieu of preparing and settling a bill of exceptions, pursuant to the provisions of section 650 of the same code, file with the clerk the notice required by section 953a thereof, requesting that a transcript of the proceedings be made up and prepared.

On the contrary, appellants caused to be duly prepared and settled a bill of exceptions, containing the usual statement of the matters occurring at the trial. Respondent moves to dismiss the appeal upon the ground that no undertaking on appeal having been given or deposit in lieu thereof made, this court has no jurisdiction of the cause, for the reason that no appeal has been perfected in the manner or form prescribed by law.

The motion is without merit. [1] The new and alternative method of taking appeals provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907, dispenses with the necessity of an undertaking. (*Estate of McPhee*, 154 Cal. 385, [97 Pac. 878]; *Mitchell v. California S. S. Co.*, 154 Cal. 731, [99 Pac. 202]; *Union Collection Co. v. Oliver*, 162 Cal. 755, [124 Pac. 435]; *Title Ins. etc. Co. v.*

California Dev. Co., 168 Cal. 397, 402, [143 Pac. 723].) Section 941b provides that the notice of appeal when filed "shall, without further action on the part of the appellant, transfer the cause for decision and determination to the higher court." "That this appeal was perfected under the new method there can be no question. Appellant filed his notice and that was all that was required to perfect it." (*Mitchell v. California etc. S. S. Co.*, *supra.*) [2] The fact that a bill of exceptions was prepared in place of the reporter's transcript authorized by section 953a has no bearing upon the question. The latter section has to do with the preparation of the record on appeal. An appeal having been properly taken in compliance with either the old or the alternative method, the record may be made up in any way permitted by the code. (*Lang v. Lilley & Thurston*, 161 Cal. 295, [119 Pac. 100]; *Union Collection Co. v. Oliver*, *supra.*)

The motion to dismiss the appeal is denied.

The original complaint in this action was filed July 8, 1914, against the Pacific Coast Borax Company, then a corporation, incorporated for a period of fifty years from and after July 5, 1912. It was alleged that plaintiff had suffered severe personal injuries by reason of the negligence of defendant in failing on two separate occasions to furnish him a safe place in which to work. After obtaining time by stipulation within which to plead, on September 18, 1914, counsel, who later specially appeared in the action for appellants, filed a general and specific demurrer, purporting to be interposed on behalf of the Borax Company. At the hearing on demurrer the same counsel orally suggested to the trial court that the corporation defendant had ceased to exist, and moved for a dismissal of the action, which was denied. The demurrer was overruled and an answer was filed on April 26, 1915.

From the answer it appeared that on September 8, 1914, which date was prior to the appearance of the company in the action by proceedings duly taken to that end, the corporation had amended its articles by changing the term for which it was to exist from fifty years to two years, two months and seven days from and after the date of its incorporation. In other words, the life of the company had expired on September 12, 1914, six days before the demurrer purporting to be on its behalf was filed in this action.

After the service of notice thereof by plaintiff on the attorneys who first made the purported appearance in the action on behalf of the Borax Company, the court granted permission to plaintiff to file an amended and supplemental complaint, naming as defendants the appellants, who were alleged to be the directors of the Pacific Coast Borax Company prior to and at the time it ceased to exist as a corporation. The amended and supplemental complaint set forth the original causes of action, the facts relating to the termination of the life of the corporation, and that the directors thereof (appellants) had thereby become its trustees, with full power and authority to settle its affairs. The prayer of the amended and supplemental complaint was for recovery "of and from the said defendants" of the amount claimed as damages by reason of the personal injuries. The court ordered that the defendants named therein be given twenty days from the date of service of a copy of the order so fixing the time in which to plead.

No summons or any notice that the appellants so alleged to be directors of the Pacific Coast Borax Company prior to and at the time it ceased to exist had been made defendants in the action was served on the defendants, or either of them, or upon any attorney of record other than upon the attorneys who first appeared and filed the demurrer and thereafter the answer before referred to. Except in the same manner, no service was made of the court's order fixing the time within which defendants might plead to the amended and supplemental complaint.

The defendants not appearing, judgment by default was entered against them in the amount prayed for. Thereupon, the defendants specially appearing by counsel for the purpose, made a motion, supported by affidavits of merit and as to the facts, for an order setting aside the default judgment and all subsequent proceedings. The motion was based on the facts, substantially set forth herein, and the further fact that no one of the defendants was a director of the Borax Company at the time it ceased to exist. No counter-showing was made by the plaintiff. The court denied the motion and appellants have appealed from the judgment.

[3] A corporation is dissolved at the expiration of the term of its corporate existence (*Kohl v. Lilienthal*, 81 Cal. 378, 386, [6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689]).

[4] The Pacific Coast Borax Company had power to shorten the term of its corporate existence by an amendment to its articles of incorporation, even if the practical result of such abbreviation amounted to almost an immediate dissolution. (*Tognazzini v. Jordan*, 165 Cal. 19, [Ann. Cas. 1914C, 655 130 Pac. 879].) [5] "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing, or being sued as a corporate body, or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void." (*Crossman v. Vivienda Water Co.*, 150 Cal. 575, 580, [89 Pac. 335].) Where there is no statute providing for the continuance of the corporation itself after dissolution, for the purpose of settling its affairs, provision is generally made for the doing of this by others. We have such a provision in this state. Section 400 of the Civil Code provides: "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." Before the supreme court was called upon to construe the provision of the act of the legislature relating to the forfeiture of charters by corporations for failure to pay license taxes, to which we will shortly refer, section 400 was held to be applicable in all cases of dissolution, whether voluntary or involuntary. (*Havemeyer v. Superior Court*, 84 Cal. 327, 365, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121]; *Crossman v. Vivienda Water Co.*, *supra*.) Construing that section in the last-mentioned case the court said: "There is no statute of this state that authorizes the commencement or continuance of an action against the corporation after its legal death. We have no statute similar to that of several states, providing that in the event of the dissolution of a corporation its existence shall be continued either indefinitely or for a specified time for the settlement of its affairs. Statutes similar to our section 400 of the Civil Code above quoted do not have the effect of continuing the existence of the corporation as

cestui que trust, or otherwise, so as to render it capable of defending actions in its corporate name. (Thompson on Corporations, sec. 6739; Clark & Marshall on Private Corporations, sec. 333; *Sturgis v. Vanderbilt*, 73 N. Y. 384.) If section 385 of the Code of Civil Procedure, providing that an action does not abate by the death or any disability of a party, if the cause of action survives, is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the 'representative or successor in interest,' brought in on motion." (*McCulloch v. Norwood*, 58 N. Y. 562, 568; see, also, *Judson v. Love*, 35 Cal. 463.)

Respondent, nevertheless, contends that the lower court having acquired jurisdiction over the defendant and the subject matter of the action by reason of the service of summons, continued to entertain and hold such jurisdiction, regardless of the fact that subsequent to such jurisdiction attaching the corporation voluntarily ceased to exist, and that, while the directors might properly be substituted as parties defendant, such substitution was not essential to a continuance of the action. He cites three cases as supporting this proposition: *Lowe et al. v. Superior Court of Los Angeles County*, 165 Cal. 708, [134 Pac. 190, 192]; *Brandon v. Umpqua Lumber & Timber Co.*, 166 Cal. 322, [136 Pac. 62]; *Turney v. Morrissey*, 22 Cal. App. 271, [134 Pac. 335]. An important distinction must be made in the consideration of these decisions. Each deals with facts arising under the provisions of the special act of the legislature relating to the payment of the license tax by corporations and cases of forfeiture under its provisions. By reference to the above statute, and acts amendatory thereof, we find that the provision of section 10a of the act of 1907 (Stats. 1907, pp. 746, 747), so strongly relied on by respondent, is restricted by the title of the act to "making provision for settling the affairs of corporations where said tax has not been paid," and by the language of the provision itself, to "cases of forfeiture under the provisions of this act."

As we read the cases relied on by respondent, they merely determine that, since the amendment of 1907 to the act in question, an action pending against a corporation which has forfeited its charter by reason of failure to pay its license

tax, shall not abate by reason of the forfeiture, but may be continued and prosecuted or defended in the corporate name, the control and management of the action, so far as the corporate interests are concerned, being in the directors or managers in office at the time of the forfeiture, they being the trustees of the corporation, its stockholders or members. (*Brandon v. Umpqua Lumber Co.*, *supra*.) We find nothing in any of said decisions, read in connection with the statute under which the cases arose, which may properly be said to remove this case, and cases like it, from the operation of the well-established general principles so succinctly stated in the authorities from which we have quoted. [6] As was so well pointed out by the chief justice in the Crossman case, *supra*, section 400 of the Civil Code, already quoted, does not have the effect of continuing the existence of a corporation after dissolution so as to render it capable of defending actions in its corporate name. It was, therefore, necessary that if the action could continue at all that its successors or representatives, under section 400, be properly brought in on motion, as provided in section 385 of the Code of Civil Procedure.

[7] Assuming the correctness of the recital in the judgment in this case, that the Pacific Coast Borax Company was regularly served with process, the filing of the demurrers and answer in its name and purporting to be in its behalf, was a nullity. So far as the dead corporation itself was concerned there could be no admission or estoppel. It could no longer be served with process, could not appear, could not itself admit anything nor authorize anyone else to do so for it. It was legally dead. (*Crossman v. Vivienda Water Co.*, *supra*.) The action of counsel, who may have had authority to represent the defendant company prior to the termination of the period of its legal existence, could not, so far as that party was concerned, vitalize any proceedings taken in the abated action after the corporation ceased to exist. Any subsequent service on them by the plaintiff of the notice of motion to file the amended and supplemental complaint, the notice that such pleading had been filed, and of the time granted the substituted defendants within which to plead thereto, was not effectual, so far as any interest of the defunct corporation was concerned. (*Deiter v. Kiser*, 158 Cal. 259, 262, [110 Pac.

921]; *Bell v. San Francisco Savings Union*, 153 Cal. 64, 69, [94 Pac. 225]; *Pedlar v. Stroud*, 116 Cal. 462, [48 Pac. 371].)

Unless, therefore, it can be shown that some other course was followed, the result of which was to properly bring the appellants into the action, after which, by due service or voluntary appearance, they were subjected to the jurisdiction of the court, the respondent will have failed to maintain his position here. [8] From the very nature of things the dissolution or death of the defendant, like the death of any other party to a pending action, could only be brought to the attention of the court on proper suggestion made by someone other than the defunct corporation itself. (*Combes v. Keyes*, 89 Wis. 297, [46 Am. St. Rep. 839, 27 L. R. A. 369, 62 N. W. 89].) If the plaintiff intended to secure any judgment in this case, enforceable against these appellants, he should have had them substituted under section 385 of the Code of Civil Procedure as parties in place of the corporation, after the latter had become *functus officio*. (*Ex parte Tinkum*, 54 Cal. 201, 203.)

The notice of motion given by the plaintiff for permission to file the amended and supplemental complaint was based upon the notice itself and upon all the records, pleadings, and files in said action. The verified proposed amended and supplemental complaint was attached to, and by apt reference made a part of, the notice and motion. There was on file in the action the purported answer of the Borax Company, which was duly verified by one purporting to have been the secretary of the corporation prior to and at the time it ceased to legally exist. It fully appeared in both of these verified pleadings that the defendant corporation was legally dead. It was alleged in the verified proposed amended and supplemental complaint that "immediately prior and at the time of said dissolution" appellants, naming them, "were the duly elected, qualified, and acting board of directors of said corporation, and that they, as such directors are now the legally constituted and authorized trustees, representatives, and successors in interest of said corporation, and trustees of the creditors, stockholders, and members of said corporation, with full power and authority to settle the affairs of said dissolved corporation, and to appear in and defend this action, and as such are true and proper defendants herein."

This notice of motion was not served on any of the appellants personally. It was addressed to the defendant Borax Company and to the attorneys who had purported to represent it in the earlier proceedings in the action. It was served on these attorneys and on no one else. [9] It seems to be the well-settled rule that the substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed otherwise than to be entered in the minutes of the court. (*Kittle v. Bellegarde*, 86 Cal. 556, 562, [25 Pac. 55]; *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323, 337.)

[10] No record appears in the transcript from which we may gather that a formal order was made and entered in the minutes of the court, either in substance or in *haec verba*, substituting the appellants as parties defendant in the place and stead of the Borax Company. We are of the opinion, however, that the notice of motion and the order of the court directing that the proposed amended and supplemental complaint be filed and made of record in the case, and further directing that the defendants named in said amended and supplemental complaint have and were given twenty days from date of a service of a copy of this order in which to plead thereto, constituted a substantial compliance with section 385 of the Code of Civil Procedure, and operated to bring about such substitution. (*Taylor v. Western Pacific R. R. Co.*, *supra*; *Campbell v. West*, 93 Cal. 653, [29 Pac. 219]; *Ford v. Bushard*, 116 Cal. 273, 276, [48 Pac. 119].) Furthermore, there is a recital in the judgment regarding the substitution of the defendants which, liberally construed, would show, whether with formality or not, the suggestion of the dissolution of the original defendant and a continuance of the action, or a revival of it, against the appellants. (*Gregory v. Haynes*, 13 Cal. 592.)

[11] One substituted in a cause must be duly notified of the fact of his being made a party before he can be affected by notices or proceedings in the action. (*Judson v. Love*, 35 Cal. 463, 469.) "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Code Civ. Proc., sec. 1014.) None of these things was done in the instant case. The attorneys for the dissolved corporation defendant were never authorized to and

never appeared as attorneys of record in the cause for appellants so as to waive service of the amended and supplemental complaint or notice of its filing and of their time to answer. Service on them alone, as we have pointed out, was a nullity after the Borax Company ceased to exist. Prior to their appearance to move to set aside the default and judgment, which was special for that particular purpose, and in no sense a general appearance in the cause (*Powers v. Braly*, 75 Cal. 237, 239, [17 Pac. 197]), they never appeared in the action for the appellants at all. Proper service of the notice that appellants had been substituted as parties defendant in the action, and of the amended and supplemental complaint, not having been made on the appellants their rights were not affected by the subsequent proceedings.

[12] It follows, therefore, that as there was no service upon, or authorized appearance by or in behalf of the defendants, the default entered in the action against the appellants was unauthorized, the judgment entered thereon was void and must be reversed. (*Linott v. Bowland*, 119 Cal. 453, [51 Pac. 687]; *Hill v. City Cab etc. Co.*, 79 Cal. 188, 191, [21 Pac. 728]; *Altpeter v. Postal Tel. & Cable Co.*, 26 Cal. App. 705-713, [148 Pac. 241].)

The judgment is reversed and the cause remanded, with directions to the trial court to vacate and set aside the default of the defendants, with permission granted to them to plead to the amended and supplemental complaint, as in the original order therefor provided.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 2988. First Appellate District, Division One.—September 3, 1919.]

FREDERICKA L. BLACKBURN, Respondent, v. R. S. MARPLE, Appellant.

[1] NEGLIGENCE — AUTOMOBILE COLLISION — FINDINGS — EVIDENCE.—In this action for damages for personal injuries suffered by plaintiff as the result of a collision between two automobiles, the findings of the trial court that the defendant was guilty of negligence in

the operation of his car and that the claim of the defendant that the plaintiff's husband was guilty of contributory negligence could not be sustained, were abundantly supported by the evidence.

[2] **ID.—APPROACH OF INTERSECTING WAY—OBSTRUCTION OF VIEW—REDUCTION OF SPEED—QUESTION OF FACT.**—The question as to the distance away from an intersecting road with an obstructed view when a driver upon the highway going at an otherwise legal rate of speed should reduce his speed to ten miles an hour under the provisions of subdivision 6 of section 22 of the Motor Vehicle Act of 1913, is necessarily a question of fact in each individual case to be determined by the trial court according to such particular circumstances as the kind of car the operator was driving, the speed at which he was previously going, the brake control of the car, and the nature of the obstruction to his view of the intersecting road.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Tanner, Odell & Taft for Appellant.

Porter C. Blackburn for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries suffered by the plaintiff as the result of a collision between two automobiles.

The facts of the case, as summarized from the findings of the trial court, are as follows: On July 14, 1915, at about the hour of 6:30 P. M., the plaintiff was riding in a Ford automobile, being driven by her husband along the state highway leading from Whittier to Fullerton, going in an easterly direction at a speed not in excess of twenty miles per hour, and was approaching the point upon said highway where a public road known as the La Habre road enters it from the south. The state highway and the La Habre road are each about sixty feet wide at this point, each having a paved center of about 18 feet in width. At the point of entrance of the La Habre road the latter makes two long curves, one turn-

2. Effect of speed and application of speed regulations on liability for collision between automobiles at or near corner of streets or highways, note, **L. R. A.** 1916A, 747.

ing into the highway to the left going west, and the other turning into the highway to the right going east, and the triangle at the point of entrance caused by their separation being unpaved but oiled and subject to travel. The private property on each side of the La Habre road at its said point of emergence into the highway is well grown up in orange trees standing within four feet of the property line, and forming quite an obstruction to the vision either of the highway or of the road by persons approaching the point of contact upon either thoroughfare. There were also some electric light poles at said point further obstructing this line of vision. As the plaintiff's husband, driving the car in which she was seated, approached the said point of emergence of the La Habre road, and was, as is variously stated, at from one hundred and fifty to two hundred feet west of said point, he observed an Overland car, operated by the defendant, turning into the state highway on the westerly curve of the La Habre road, and immediately turned his Ford car to the right of the center of the highway going east, and slowed down his speed to eight miles an hour. The defendant proceeded on said curve until he had arrived at about the center of the state highway when, instead of proceeding on the course which would have taken his machine to the right of the center of said highway going west, he suddenly turned his car to the left, and without slowing down proceeded to turn directly across the course of the car in which the plaintiff was riding. The plaintiff's husband, seeing this action, turned his car farther and farther to the right until he was forced off of the paved portion of the highway and on to the dirt strip along it and into the edge of the adjacent orange orchard, where his car was struck by the defendant's car, and badly damaged, and the plaintiff was severely injured by the impact.

The trial court, the cause having been tried without a jury, found from the foregoing facts that the defendant was guilty of negligence in the operation of his car, and that the claim of the defendant that the plaintiff's husband was guilty of contributory negligence could not be sustained, and accordingly rendered judgment in the plaintiff's favor for the sum of one thousand dollars damages, from which the defendant prosecutes this appeal.

[1] From our examination of the testimony, and particularly of the exhibits before us, we are entirely satisfied that the findings of the trial court, of which the foregoing is a brief summary, are abundantly supported by the evidence in the case, and that in point of fact the real cause of the collision was that given by the defendant himself to the plaintiff's husband, and also to several bystanders immediately after the accident that, "he got rattled and lost control of the machine." [2] The only contention of the defendant which saves him from the penalty which would otherwise be justly imposed for taking a frivolous appeal is his contention that the plaintiff's husband was guilty of contributory negligence as a matter of law for a violation on his part of the provisions of subdivision 6 of section 22 of the Motor Vehicle Act of 1913 in force at the time of said accident, which required that persons operating motor vehicles on the public highways of this state should operate or drive their cars at no greater speed than one mile in six minutes "where the operator's view of the road traffic is obstructed upon approaching an intersecting way." This point made on behalf of the appellant is also devoid of merit for two reasons: First, the question as to the distance away from an intersecting road with an obstructed view when a driver upon the highway going at an otherwise legal rate of speed should reduce his speed to ten miles an hour under the said provisions of said act is necessarily a question of fact, in each individual case to be determined by the trial court according to such particular circumstances as the kind of car the operator is driving, the speed at which he was previously going, the brake control of the car, the nature of the obstruction to his view of the intersecting road, etc.; and the point is without merit for the second reason, which is that, according to the evidence in the case, which fully sustains the finding of the court, the plaintiff's husband was from one hundred and fifty to two hundred feet west of the point of emergence of the La Habre road going at a rate of speed not in excess of twenty miles an hour when he first discovered the defendant's car coming into the highway, and that he immediately reduced his speed to eight miles an hour, and took a position on the highway which would have led to an entire avoidance of the accident if the defendant had not, to employ his own language, "got rattled and lost control of his car," with the result that he

crossed over unexpectedly to the wrong side of the highway and there ran the plaintiff's conveyance down in spite of the driver's utmost effort to avoid a collision.

Judgment affirmed.

Waste, P. J., and Bardin, J., *pro tem.*, concurred.

[Civ. No. 2992. First Appellate District, Division One.—September 4, 1919.]

WILL D. GOULD, Executor, etc., Appellant, v. E. B. VAN HORNE, Respondent.

- [1] **GIFTS—INTENT OF DONOR—FINDING—EVIDENCE.**—In this action to recover a sum of money alleged to be due from defendant to the estate of plaintiff's testate, there was sufficient evidence to support the finding of the trial court to the effect that it was the testate's intent to make an absolute gift of the money to defendant.
- [2] **ID.—PAYMENT OF INTEREST—RETURN OF PART OF PRINCIPAL—ORIGINAL INTENT NOT DEFEATED.**—Where such intent to make an absolute gift existed, it would not be defeated by the further fact that the donor required of the donee that he pay her interest on the sum given during her lifetime, nor even by the fact that he gave her back some of the principal at her request.
- [3] **ID.—ADMISSIBILITY OF DECLARATIONS OF DONOR.**—In determining the intent of the donor, declarations made by her both before and after the transaction are admissible as tending to show a gift.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

The facts are stated in the opinion of the court.

Will D. Gould, *in pro. per.*, James H. Blanchard and Bordwell & Mathews for Appellant.

George Beebe and J. Marion Wright for Respondent.

1. What constitutes good gift of debt of donee, note, *Ann. Cas.* 1915A, 18.

RICHARDS, J.—This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff as executor of the last will and testament of Mary M. Shaw, deceased, to recover the sum of \$17,250.66, alleged to be due from said defendant to the estate of said deceased upon his promissory note. The defendant's amended answer set up that there was no consideration for said note, and further set forth the circumstances under which the note had been signed as the basis for the defendant's claim that it was executed under a mutual mistake of the parties.

The facts of the case as developed at the trial are substantially these: In the month of April, 1911, Mary M. Shaw was and for some years prior thereto had been a woman of considerable means residing in Los Angeles; the defendant had, during such time, been a real estate and general business agent in said city, and as such had been looking after the business interests of said Mary M. Shaw, who had come to have great confidence in him and to display a strong liking for him. For some time prior to the month of April, 1911, said Mary M. Shaw had signified to the defendant and said to other persons that she intended to make a gift to the defendant of the sum of twenty thousand dollars, which sum was to be derived from the collection of one of her outstanding mortgages when the same should be paid. On a certain day in April, 1911, she came into the defendant's office with a check for the full amount of said mortgage, together with about \$700 in interest, and handed the check to the defendant, saying, "Van, here is that check that I have been waiting for some time to give you; everything has been paid off and I want you to take it." She also stated to several other people about the office at the time that she was giving the defendant the money outright as a gift, and also gave as a reason therefor that she thought as much of him as she would of a son, and that he had done as many things for her as a son could do, and that her relations would get everything she had after she died and were just waiting for her to die. At various times thereafter up to the time she did die in the year 1913 she repeated these statements to various persons. The evidence also showed that at the time she handed the check to the defendant she refused to take any writing from him upon the ground that it was his money, but said that she would like him "to pay interest on it during her lifetime,

and if she wanted any additional sums at any time she needed it I would take and advance it to her." The record shows that from time to time thereafter the defendant gave the decedent sums of money, and particularly shows that she asked the defendant for some money in the year 1912, and that he then paid her the sum of one thousand dollars, and at the time of doing so had her sign a receipt drawn by himself showing that of the sum then paid \$646.25 was the interest up to May 24, 1912, and \$353.75 was to be applied upon principal, leaving \$16,646.25 yet due on principal. Upon the death of Mary M. Shaw the plaintiff herein, who had been her attorney for a number of years and who was named in her will as her executor, was duly appointed as such upon the probate of her will, and after qualifying as such executor had an interview with the defendant with respect to this money, which he asserted was an asset of the estate and for which he threatened to bring suit unless the defendant would execute a note to the estate for the balance claimed to be due. The defendant protested that the decedent had made a verbal gift to him of the money, but the executor stated that he was legally liable for it "by reason of the fact that the defendant had no writing to show," and also on account of the existence and terms of the receipt above referred to. The defendant, who had known the plaintiff as an attorney and personally for many years and had much confidence in his ability and integrity, and who also did not wish to be sued, finally signed the note which forms the basis of this suit. Upon the trial of the case the defendant and his witnesses testified to the foregoing state of facts. The trial court made its findings in conformity to the foregoing facts, and rendered its judgment accordingly in the defendant's favor.

[1] The plaintiff, upon this appeal, urges three main grounds for a reversal of the case. The first of these is that the facts as shown are insufficient to support the finding of a gift *inter vivos* to the defendant, but at most are merely evidence of an intent on the part of the deceased to make a gift to take effect upon her death. Much of the appellant's argument upon this point is devoted to a discussion of the weight of the evidence, but as to this we think that there was sufficient evidence, if believed by the court, to sustain its finding to the effect that it was the donor's intent to make

an absolute gift of the money in question to the defendant. [2] If such was her intention it would not be defeated by the further fact that she required of the defendant that he pay her interest on the sum given during her lifetime, nor even that he give her back some of the principal, if desired. (*Robertson v. Robertson*, 147 Ala. 311, [10 Ann. Cas. 1051, 3 L. R. A. (N. S.) 774, 40 South. 104]; *Goodrich v. Rutland etc. Bank*, 81 Vt. 147, [17 L. R. A. (N. S.) 181, 69 Atl. 651]; *Doty v. Willson*, 47 N. Y. 580; *Young v. Young*, 80 N. Y. 422, [36 Am. Rep. 634]; *Miller v. Western College etc.*, 177 Ill. 280, [69 Am. St. Rep. 242, 42 L. R. A. 797, 52 N. E. 432].)

[3] The appellant incidently urges an objection to the testimony of certain witnesses as to subsequent declarations of the decedent as to her intention in giving the defendant the money in question; but this objection has no merit since it is well settled that in determining the intent of a donor declarations made by her both before and after the transaction are admissible as tending to show a gift (*Calkins v. Equitable B. & L. Assn.*, 126 Cal. 531, [59 Pac. 30]; *Estate of Hall*, 154 Cal. 527, [98 Pac. 269]; *Helm v. Martin*, 59 Cal. 57).

The final contention of the appellant is that the trial court erred in permitting the plaintiff while upon the witness-stand to be asked in cross-examination, over the plaintiff's objection, the following question: "Would you have gotten Mr. Van Horne to sign this note, plaintiff's Exhibit 1, if you had been in possession of the facts which you now have?" The witness answered "No." While it seems to be conceded that the question was improper, it is to be noted that the case was on trial before the court sitting without a jury, and that the testimony of the defendant and his several witnesses as to the circumstances attending the gift was without contradiction; and hence that the trial court if he believed this testimony had abundant evidence before him to sustain his findings regardless of what the mental attitude of the plaintiff, either before or after the institution of the action, might be. Under such conditions we do not think that the error, if such it be, sufficiently prejudicial to justify a reversal of the case.

Judgment affirmed.

Bardin, J., *pro tem.*, and Waste, P. J., concurred.

[Civ. No. 2982. First Appellate District, Division One.—September 4, 1919.]

ADA M. BISHOP, Appellant, v. ELIZABETH J. BARNDT
et al., Respondents.

- [1] **VENDOR AND VENDEE — CONTRACT FOR SALE OF REAL PROPERTY — ACCEPTANCE OF OVERDUE PAYMENTS — SUSPENSION AND REVIVAL OF RIGHT OF FORFEITURE.**—Where time is made the essence of a contract for the payment of money, and this covenant is waived by acceptance of installments after they are due with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving a definite and specific notice of an intention to enforce it.
- [2] **ID.—AGREEMENT OF VENDEES TO SELL TO THIRD PERSON — PRIVACY OF CONTRACT WITH ORIGINAL VENDOR.**—A purchaser of property under an installment contract, by entering into a contract of sale of said property to a third person, creates no privity of contract or estate between such third person and the original vendor without assigning his interest, in whole or in part, under the original contract of purchase.
- [3] **ID.—ACTION TO DECLARE FORFEITURE — PARTIES — REMOVAL OF CLOUD FROM TITLE.**—Such third person having placed her contract to purchase of record, upon default of the vendees under the original contract of purchase, the original vendor was entitled to make her a party defendant in an action to declare a forfeiture of the rights of the original vendees and to have such cloud removed.
- [4] **ID.—SUFFICIENCY OF NOTICE TO RESTORE RIGHT OF FORFEITURE — DUTY TO NOTIFY THIRD PARTY.**—In this action by the vendor to declare a forfeiture of the rights of the vendees in and to certain real property under an agreement of sale, the plaintiff, by the acceptance of installments after they were due, having worked a temporary suspension of the right of forfeiture, the notice given to the real party in interest under the agreement of sale was sufficient to revive and restore all plaintiff's rights under her contract. It was not necessary that she also give notice to the third person with whom her vendee has entered into an agreement of sale of such property to which she was not a party.
- [5] **ID.—FAILURE TO COMPLY WITH NOTICE — FORFEITURE OF RIGHTS UNDER CONTRACT — DECREE — EQUITY.**—When the vendor gave the vendees a reasonable time to pay the money due under their con-

1. Vendor's acceptance of payment tendered after time specified as waiver of provision making time of essence of contract, note, 9 A. L. R. 996.

tract of purchase, they should have met the requirements of the notice, and when they did not they forfeited all their rights under the contract in accordance with the terms therewith; and in an action brought for that purpose, the vendor was entitled to a decree that all their rights thereunder were at an end, in the absence of some equitable showing to excuse their failure to comply with the terms thereof.

[6] ID.—SPECIFIC PERFORMANCE—ADEQUACY OF CONSIDERATION—JUSTNESS AND REASONABLENESS OF CONTRACT—PLEADING AND PROOF.—

In this action by the vendor to quiet her title to certain property agreed to be sold, the original vendees being in default in the payments, the court committed error in decreeing specific performance of the contract of sale in favor of one of the defendants, a third person to whom such vendees had contracted to sell such property, it not being alleged in the answer of such defendant that the consideration to be paid plaintiff was adequate, or that the original contract of sale was just and reasonable, and no evidence was introduced upon this subject, and no finding made in regard to it.

APPEAL from a judgment of the Superior Court of Orange County. W. H. Thomas, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Hartley Shaw for Appellant.

G. P. Adams and John C. Stick for Respondents.

WASTE, P. J.—This, in form an action to quiet title, is, in effect, one to declare a forfeiture of the rights of all the defendants in and to the real property in question. The facts of the case appear from the findings, fully supported by the testimony.

By an agreement of sale, made on February 6, 1913, the plaintiff agreed to sell, and the defendant, Elizabeth J. Barndt, agreed to buy, the land in question for the sum of one thousand three hundred dollars, payable one hundred dollars upon the execution of the agreement, four hundred dollars on March 1, 1914, four hundred dollars on March 1, 1915, and four hundred dollars on March 1, 1916, with interest at the rate of seven per cent per annum, payable semi-annually, the buyer to pay all taxes after March 1, 1913. This contract, almost immediately after its execution, was assigned and transferred to defendant Stick, and, together

with said assignment on the back thereof, was recorded in the office of the county recorder of Orange County, but not until May 29, 1915, just before this action was commenced. Time is the essence of the contract.

On August 14, 1913, defendant Stick sold the property under another contract to defendant Beulah B. Coward for the sum of two thousand four hundred dollars, on account of which defendant Coward had paid the sum of \$1,863.81 before trial of the action.

The initial payment of one hundred dollars, due under plaintiff's contract, was paid at the time of the execution of the agreement. The four hundred dollar installment on account of principal, due March 1, 1914, and the various payments on account of interest, falling due prior to February 6, 1915, were paid by defendant Stick. None of these payments were made when due, but at various dates thereafter, and each was received and accepted by the plaintiff without any objection on her part. At the time the suit was commenced—July 23, 1915—the payment of interest due on February 6, 1915, and the four hundred dollar installment on account of principal, due March 1, 1915, had not been paid to plaintiff. Plaintiff had also paid certain taxes, assessed against the property, which had not been repaid.

Prior to the bringing of the action, no notice of any delinquency of any payment, or demand for the payment of the same, was made, or served, upon defendants Stick or Coward. Plaintiff never gave to the said defendants, or either of them, any notice that she would, or did, insist upon the provisions of the agreement between herself and Barndt, as to time being the essence of the agreement, or that she would declare a forfeiture of her contract with defendant Barndt, although she became aware of the existence of the agreement between defendants Stick and Coward in June, 1915, about one month before bringing this action.

The court found that defendants Stick and Coward were ready, willing, and able to pay to the plaintiff all moneys due under the contract between herself and the defendant Barndt. Those defendants, in open court, in keeping with this finding, offered to pay the amount, together with all taxes paid by plaintiff, and costs of suit, upon the condition that plaintiff convey the title to the premises to either of them, and deliver to the grantee a certificate of title, as provided in the original

contract. Defendant Stick, by stipulation filed in the action, consented to the transfer being made directly to the defendant Beulah Coward. Plaintiff declined to accept the tender and convey the property. Counsel for the respective parties, by stipulation, then agreed that the amount due upon principal and interest, under the contract between plaintiff and defendant Barndt, provided the same was then in force, amounted at that time to \$901.87; that the taxes paid by plaintiff on said premises, including interest, amounted to \$13.20, and that plaintiff's costs amounted to \$19.95, making the total of principal, interest, taxes and costs the sum of \$935.02. The defendants Stick and Coward then made tender of that amount in open court to the plaintiff, and the tender was refused. In lieu of the payment of the money into court, pending the final determination of the action, it was stipulated that the amount be deposited with a trustee, to hold the same, with proper instructions as to its disposition.

As its conclusion of law from the foregoing facts, the court found that plaintiff was entitled to recover of and from the defendants John C. Stick and Beulah Coward the above amount, upon her executing and delivering a proper deed and certificate of title, and, also, that the defendants in the action were entitled to a judgment and decree that plaintiff execute such conveyance to defendant Coward, and furnish proper certificate of title. Judgment and decree was entered in accordance with the findings. It was further decreed that, in the event said plaintiff refused to make such deed of conveyance and furnish such certificate of title within forty days from the date of the judgment, the clerk of the court make, execute and deliver to the defendant Coward such conveyance for and on behalf of plaintiff, and obtain and turn over the certificate of title, as directed. Plaintiff has appealed.

The judgment and decree of the lower court, if it is to be upheld, must rest upon the legal effect of its findings, that all of the payments on the contract between plaintiff and defendant Beulah Coward, other than the initial payment of one hundred dollars, were made at various dates after the same became due, according to the terms of the contract, and were received and accepted by plaintiff without objection upon her part. From this conduct on the part of plaintiff, the trial court apparently reached the conclusion that plaintiff had waived the default, and failure to comply strictly and

punctually with the conditions of the agreement to such an extent that plaintiff had induced the purchaser and assigns, in reliance thereon, to alter their course as to strict and punctual compliance with the contract. There is no finding to this effect.

In addition to the facts outlined above, as found by the trial court, it appears from the evidence that Gail E. Moon, who was made a defendant, and answered generally, denying the allegations of the complaint, was the real vendee in interest in the contract between plaintiff and defendant Barndt. On May 18, 1915, and before she knew of the claim of defendant Coward to an interest in the property in litigation, plaintiff directed her attorney to send a letter to Moon. In this communication, after calling attention, by apt reference, to the contract between plaintiff and Mrs. Barndt, counsel said:

"I understand that you are the present owner of this contract, and this is to notify you that the sum of \$400.00 due under the terms of said contract March 1st, 1915, has not been paid, and that the interest has not been paid beyond August 6th, 1914.

"You are hereby notified that unless the sums due under this contract are paid within fifteen days from date hereof, Mrs. Bishop will exercise the rights conferred upon her by the contract, which recites that time is the essence thereof, and will declare all your rights under said contract to be forfeited, and will not recognize herself as being under any further obligation to perform said contract."

No attention was paid by defendants to this notice, and the amounts due were not tendered or paid to plaintiff. After waiting two months plaintiff commenced her action to quiet title.

Upon the foregoing admitted facts, the first question that arises is as to what were the rights of the respective parties on May 18, 1915, the date of plaintiff's letter to defendant Moon? On that date the defendants were more than three months in default in respect to the semi-annual installment of interest due under the contract, for the six preceding months, and nearly three months in default as to the payment of the installment on principal due March 1, 1915. According to the strict letter of the agreement, making time the essence thereof, the vendees under the contract were then subject to the penalty of having their contracts canceled and of a

forfeiture of the payments which they had theretofore made, unless, as contended by defendants, the plaintiff, by receiving without objection the several payments which the defendants had tardily made, can be held, by her action in so doing, to have waived her right to insist upon the strict letter of the contract. Defendants claim that plaintiff is no longer entitled to take advantage of their past delinquencies, so as to either declare the contract canceled because of them, or to claim a forfeiture of such payments as she had theretofore received without objection, when they were not made on the dates fixed by the contract. In urging this contention they rely, among many others, upon *Pearson v. Brown*, 27 Cal. App. 125, 129, [148 Pac. 956]; *Boone v. Templeman*, 158 Cal. 290, 295, [139 Am. St. Rep. 126, 110 Pac. 947]; *Stevinson v. Joy*, 164 Cal. 279, 285, [128 Pac. 751]; *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 302, 307, [136 Pac. 57].

These cases support respondents' contention, as being the correct rule under proper circumstances. Our attention has not been called, however, to any cases holding that the vendor may not by proper steps revive such right of forfeiture after default. [1] On the contrary, it is the law that where time is made the essence of the contract for the payment of money, and this covenant has been waived by acceptance of the installments after they were due, and with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving a definite and specific notice of an intention to enforce it. (*Stevinson v. Joy*, *supra*; *Boone v. Templeman*, *supra*.) As was said in the latter case, "The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and as to those following, the provisions of the contract are left to operate with unimpaired force." This court, in *Brown v. Pearson*, *supra*, took note of this power, resting in a vendor to revive and restore the right to a forfeiture under contracts wherein time is made the essence thereof. In speaking of the notice given in that case the court said: "The utmost effect, under the foregoing rule [relating to waiver by accepting past due payments] which would be given to it would be that of a notification to

the vendees that the vendor intended thereafter to insist upon a strict compliance upon the terms of the contract; and, that unless within a reasonable time the vendees paid up their deficiencies and thereafter made their payments strictly in accordance with the time conditions of their contract, the forfeiture clause would be enforced."

Appellant contends that she has complied with all the requirements of the rules laid down by the cases we have cited, in that ample notice of default and forfeiture was in fact given. She relies upon the notice contained in the letter of May 18th, sent by her attorney to the defendant Moon. This letter, as will be noted, was sent after the assignment from Barndt to Stick, and the execution of the separate contract between Stick and Miss Coward, and before plaintiff had knowledge of the latter's claim to an interest in the property. Appellant's first contention in this regard is that Moon was still the owner and holder of all the rights under the original contract, and that service of the notice upon him was sufficient within the application of the established rule. In making this contention she relies, first, upon the fact that the assignment by Mrs. Barndt was executed and delivered in blank, the name of John C. Stick, as assignee, having been inserted thereafter, and, for the law to sustain the proposition, cites *Arguello v. Bours*, 67 Cal. 447, [8 Pac. 49]. In that case it was held that a deed, in which the name of the grantee was left blank by the grantor at the time of its execution and afterward inserted without his authority, did not convey any interest, nor become sufficient to pass title because the grantee entered into possession and paid the purchase price. We have no such state of facts in the present case. Mrs. Barndt signed the assignment in blank, with the knowledge of the defendant Moon, the real party in interest, and he, in turn, delivered the contract to defendant Stick, who appears to have at all times conducted the entire transaction for and on his behalf. Thereafter, the name of Stick was written into the assignment with Moon's knowledge and consent, and apparently for the purpose of carrying out some arrangement between the two. Moon was estopped to deny that the assignment, as delivered to Stick, was valid, duly executed, and binding upon him (*Dolbeer v. Livingston*, 100 Cal. 617, 621, [35 Pac. 328]), and appellant, who was not a party to the assignment, cannot complain.

Appellant's second point in support of her contention that the notice given to Moon was amply sufficient to revive her right of forfeiture, is that, notwithstanding the assignment by the latter to Stick, Moon was in reality the owner of all the rights conferred by the contract. This suggestion is entitled to more serious consideration. The testimony bearing on this subject is neither full nor elucidating, and some of it is hearsay. But the only inference which can safely be drawn from the evidence is that appellant is correct in her contention. There is absolutely no showing to the contrary. Notwithstanding that the trial court found that defendants, Barndt and Moon, had no right or interest in the real property, we are fully satisfied from the statements made by Stick to plaintiff and the admissions contained in his letters to her and from the testimony of Moon that Stick and Moon were one in interest in the contract. Moon testified that Stick acted as his representative in dealing with Miss Coward.

Appellant's contract bound her, on receiving the payments at the time and manner therein mentioned, to deliver a certificate of title showing the property free from encumbrances, and execute and deliver to the buyer or her assigns a good and sufficient deed thereof. She contends, however, that defendant Coward was not an assignee of the contract, and in no way party thereto; that there was no privity between plaintiff and her, and that Miss Coward was not entitled to the notice to perform, and is not now in position to enforce the contract. Appellant is correct in this contention. While defendant Stick had an ostensible equitable interest in the land acquired by the assignment of the Barndt contract, which he had the right to contract to convey to Miss Coward (*Rogers Dev. Co. v. Southern California etc. Inv. Co.*, 159 Cal. 735, 739, [35 L. R. A. (N. S.) 543, 115 Pac. 934]), she was a stranger to the plaintiff. Her agreement with Stick was a separate and independent contract, without any reference to the contract between plaintiff and Barndt, and plaintiff was not required to take any notice of it. [2] Stick, by contracting to sell to Miss Coward, could not create a privity of contract or estate between her and plaintiff without assigning his interest, in whole or in part, under the original contract. Plaintiff, without such assignment, and notice of it, was entitled to stand upon her contract with her vendee regardless of any subcontract the latter might make.

The contract between defendant Stick and Miss Coward did not operate as an assignment of the contract between plaintiff and Barndt. Miss Coward assumed no obligations under that agreement toward plaintiff so as to bring herself into privity with her. This being so, she acquired no rights under the contract, and, having no rights, consequently there was nothing to forfeit. [3] Her claim, however, operated as a cloud upon the title of plaintiff which she was entitled to have removed in this form of action. (*Stratton v. California Land etc. Co.*, 86 Cal. 353, 360, [24 Pac. 1065].)

[4] The notice served by plaintiff on defendant Moon was, in our opinion, under the disclosed facts of this case, sufficient to revive and restore all plaintiff's rights under her contract, and she is now entitled to stand upon its terms.

[5] When she gave the defaulting vendees a reasonable time within which to pay the money due thereunder, they should have met the requirements of the notice. When they did not they forfeited all rights under the contract. Plaintiff is doing no more than to insist that under the terms of the contract defendants have no further rights thereunder, but have forfeited all such. Her action to quiet title amounted to no more than the calling of the defaulting vendees into court to show why it should not be decreed that, under the terms of the contract, all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, which defendants failed to make, the plaintiff was entitled to such decree. (*Oursler v. Thatcher*, 152 Cal. 739, 745, [93 Pac. 1007].) Defendants were not entitled to the finding made by the trial court that the contract between plaintiff and Mrs. Barndt was still in force and effect. It is a finding against fact. The finding that the contract made between defendants Stick and Miss Coward was still in force and effect is a finding on an immaterial issue.

[6] Specific performance in this case was decreed upon the answer of defendant Coward. Even though she were in position to seek such relief, her answer does not state sufficient facts, for it is not alleged therein that the consideration to be paid plaintiff for the land is adequate, or that the Barndt contract is just and reasonable. (*White v. Sage*, 149 Cal. 613, 614, [87 Pac. 193].) No evidence was received upon this subject, and there is no finding in regard to it.

A decree for specific performance cannot be supported in the absence of allegation and finding that the contract was just and reasonable, and the consideration adequate. (Civ. Code, sec. 3391; *Gibbons v. Yosemite Lumber Co.*, 172 Cal. 714, 716, [158 Pac. 196].)

The judgment is reversed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 2980. First Appellate District, Division One.—September 4, 1919.]

M. W. FINDLEY et al., Respondents, v. LYCURGUS LINDSAY, Appellant.

[1] PLEADING—ACTION ON NOTE AND CONTRACT—ADMISSION OF EXECUTION AND DEFAULT—FAILURE TO RAISE MATERIAL ISSUE.—Where, in an action on a promissory note and contract which called for the payment by the defendant to the plaintiffs of a stated sum as the purchase price of certain shares of the capital stock, the answer of the defendant admitted all the allegations of the complaint with respect to the purchase of said stock and the execution of the note and contract, but denied for want of information and belief an averment in the complaint to the effect that the trustee mentioned in the contract had assigned and transferred to the plaintiffs the note in question after the maker's default according to the terms and requirements of said contract, which assignment and transfer it was the duty of the said trustee *pro forma* to make upon the plaintiffs' demand after such default, according to the express agreement of the defendant in said contract, the default of the defendant not being denied, no material issue was presented.

[2] *Id.*—REFUSAL OF LEAVE TO FILE AMENDED ANSWER—DISCRETION OF TRIAL COURT.—In such action the trial court committed no error or abuse of discretion in refusing defendant leave to file an amended answer at the time of trial, which was four months after his original answer was filed, where the affidavit offered in support of such motion presented no sufficient reason as an excuse for the defendant's delay in presenting his amended answer, and the proposed amended answer presented no sufficient averments of fraud in respect to the transaction in the course of which said note was executed by the defendant to constitute a defense thereto.

[3] **ID.—FRIVOLOUS APPEAL—PENALTY.**—In this action, it being obvious that the whole procedure of the defendant had been marked with a deliberate design to delay the operations of justice in respect to the enforcement of his just and legal obligation, the judgment was affirmed with an added penalty of five hundred dollars imposed upon the appellant for the taking and prosecution of a frivolous appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. L. Abrahams, C. W. Fricke and W. I. Gilbert for Appellant.

Edwin A. Meserve and Shirley E. Meserve for Respondents.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff in an action to recover the sum of fifteen thousand dollars with interest, attorneys' fees and costs, alleged to be due upon a promissory note of the defendant.

The only question presented upon this appeal is as to whether the trial court erred in denying the defendant's application to amend his answer at the time of the trial of the case.

That this is one of the most flagrant instances of abuse of the processes of justice for purposes of delay and of a frivolous appeal which has come within our purview the following undisputed facts will show: The plaintiffs commenced this action on May 13, 1916, by filing their complaint upon a promissory note and contract which were set forth therein and which called for the payment to the plaintiffs of the sum of fifteen thousand dollars by the defendant as the purchase price of 1,287½ shares of the capital stock of the Independent Sewer Pipe Company and four shares of the capital stock of the Pacific Tile and Terra Cotta Company. [1] On June 26, 1916, the defendant filed his answer herein admitting all the allegations of the complaint with respect to the purchase of the said stock and the execution of the note and contract, but denying for want of information and belief an averment in the complaint to the effect that the trustee mentioned in the contract had assigned and transferred to the

plaintiffs the note in question after the maker's default according to the terms and requirements of said contract, which assignment and transfer it was the duty of the said trustee *pro forma* to make upon the plaintiffs' demand after such default, according to the express agreement of the defendant in said contract. As the defendant's default was not denied it would seem that this sole denial of the defendant for want of information and belief did not present a material issue. The plaintiffs, nevertheless, moved the court on July 3, 1916, to set the cause for trial. The defendant appeared in opposition to said motion by one of his attorneys of record, who announced in court that he intended to file an amended answer setting up fraud in the obtaining of said note. The court set the cause for trial on October 25, 1916, in order to allow the defendant ample time to prepare, serve, and file said amended answer if he so desired. A few days before the said date of trial an assistant in the office of an attorney, who was not one of the attorneys of record for said defendant, made an effort to have the trial of the cause further postponed on the ground that his principal expected to be employed to try the cause on behalf of the defendant. This effort was unsuccessful. On the morning of October 25, 1916, when the cause was called for trial, one of the attorneys of record for the defendant appeared to suggest that another of his attorneys of record could not be present, but had arranged with the above-mentioned attorney who was not of record to try the cause, and the latter could not do so because he was engaged in a trial in another court. The court's attention was then called to the fact that said last-named absent attorney was not an attorney of record in the case, and furthermore that no amended answer had ever been served or filed. The attorney of record for the defendant who was then present in court, and who had previously announced the defendant's purpose to present such an amended answer, made no statement or offer indicating that the defendant intended or desired to amend his pleading, whereupon the court set the cause peremptorily for trial for the hour of 1 o'clock P. M. of said day. At said hour the aforesaid attorney not of record for the defendant was present to ask a further postponement of the case, which request the court refused to grant. The trial then proceeded, and after a witness for the plaintiff had been sworn, one of the attorneys of record appeared with an affidavit and amended answer of

the defendant which he then asked leave to file. The affidavit presents no sufficient reason whatever as an excuse for the defendant's delay in presenting his amended answer, and the amended answer presents no sufficient averments of fraud in respect to the transaction in the course of which said note was executed by the defendant to constitute a defense thereto. The court, after an examination of said affidavit and answer, refused permission to the defendant to file the same and ordered the trial to proceed. The defendant presented no evidence upon the further hearing of the case, and judgment accordingly went for the plaintiff for the recovery of the full amount due upon the note, with counsel fees and costs. The defendant appealed to the supreme court, the notice of appeal being filed on November 15, 1916. The appellant's opening brief was filed February 16, 1917. The respondents' brief, filed March 19, 1917, directed attention to the foregoing facts as disclosed by this record, and urged that the appeal was frivolous and taken for delay. No reply brief on behalf of the appellant has ever been filed. The cause was transferred to this court for hearing on May 19, 1919, and was set for argument on August 11, 1919. No appearance was made by appellant on said date, and the cause was submitted without argument for decision.

[2] As to the merits of the case it is obvious that the trial court committed no error or abuse of discretion in refusing defendant leave to file his belated and insufficient amended answer; and it appears to us equally obvious that the whole procedure of the defendant herein, from the time of his first appearance in the case down to the present moment, has been marked with a deliberate design to delay the operations of justice in respect to the enforcement of his just and legal obligation, and to persist in and consummate such purpose by the taking and prosecution of a frivolous appeal.

[3] The judgment is affirmed with the added penalty of five hundred dollars hereby imposed upon the appellant for the taking and prosecution of a frivolous appeal.

Waste, P. J., and Bardin, J., *pro tem.*, concurred.

43 Cal. App.—11

[Civ. No. 1956. Third Appellate District.—September 5, 1919.]

**COMMERCIAL SECURITY COMPANY (a Corporation),
Appellant, v. MODESTO DRUG COMPANY (a Corpo-
ration), Respondent.**

- [1] **CORPORATIONS—INSTRUMENTALITY OF INDIVIDUAL FOR TRANSACTION OF BUSINESS—LIABILITY OF EACH FOR ACT OF OTHER.**—Where it appears that a corporation is but the instrumentality through which an individual for convenience transacts a particular business, not only equity, looking through form to substance, but the law itself, will hold such corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by acts which bound his corporation.
- [2] **ID.—CREATION OF OBLIGATION BY AGENT—FAILURE TO COMPLY WITH BY-LAW—LIABILITY OF CORPORATION.**—Where an obligation is created by the duly authorized agent of a corporation for such corporation, where most if not all of its capital stock is held and owned by one person, and the obligation is one the making of which is within the corporate powers of the corporation, and the act of making it is, therefore, not *ultra vires*, the corporation will be held bound to and liable for the proper execution of the terms of the obligation, notwithstanding it may be shown that the act of making the agreement was not in strict accord with the adopted rules or the by-laws of the corporation with respect to such matters.
- [3] **ID.—OFFICER IN GENERAL CONTROL OF AFFAIRS—POWERS CONFERRED BY GENERAL AUTHORITY.**—A corporation is an artificial person, and where it is organized for commercial purposes, its president or general manager, or whoever may be given immediate direction or control of its affairs is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to do some particular act, which is included in the ordinary affairs of such corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation authority to perform such particular act will be inferred from the general authority so given.
- [4] **ID.—OSTENSIBLE AUTHORITY OF AGENT—RIGHTS OF THIRD PARTIES.**—Where an officer of a corporation is held out to be possessed of power to perform all acts involved in its ordinary or

usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him.

- [5] **ID.—ACCEPTANCE OF BENEFITS—RATIFICATION—ESTOPPEL.**—In this action on two promissory notes executed by the president and manager of the defendant corporation, the act of such corporation in accepting the benefits of the agreement entered into by such president and manager amounted to a consent to all the obligations thereof and if, therefore, there was not thereby in law a ratification of the transaction, the corporation was, by its act of accepting the benefits of the obligation, estopped from denying the binding force thereof upon it. The legal effect of either ratification or estoppel in such a case is precisely the same.
- [6] **NEGOTIABLE INSTRUMENTS—CONSIDERATION PRESUMED FROM WRITING—KNOWLEDGE OF INFIRMITY—WHEN INNOCENT PURCHASER PROTECTED.**—A written instrument is itself presumptive evidence of a consideration, and where there is not in the possession of the purchaser of a promissory note knowledge of any infirmity in the paper on the score of consideration, or of facts, which, when followed with reasonable diligence, would lead to the discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an innocent purchaser for a consideration, and so may enforce payment thereof.
- [7] **CORPORATIONS—SEAL NOT AFFIXED—WANT OF AUTHORITY—EVIDENCE.**—The fact that the seal of the corporation was not affixed to the notes is neither conclusive evidence of a want of authority for the execution thereof for the corporation, nor a circumstance sufficient to create even a suspicion that the notes were wanting in a consideration, or that their consideration had failed at the time of their transfer to the plaintiff.
- [8] **ID.—EFFECT OF SEAL—PROOF OF AUTHORITY BY PAROL.**—Corporations of all kinds may be bound by their contracts not under seal. The seal of a corporation itself performs no further or greater function than to import *prima facie* verity of the due execution by the corporation of written obligations. The fact that such contracts were duly authorized by the corporation may be shown by parol.

5. Ratification of unauthorized contract entered into by officer by acceptance and retention of benefits, note, 7 A. L. R. 1446.

7. Effect of failure to affix seal to instrument executed by corporation, note, Ann. Cas. 1915A, 1064.

[9] **NEGOTIABLE INSTRUMENTS—TRANSFER BY BILL OF SALE—NOTICE OF INFIRMITY.**—The fact that the plaintiff took a bill of sale of the notes with a guaranty from the payee that they would be paid, in lieu of the customary indorsement in such a case, does not constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be. Such may have been the uniform custom and policy of the plaintiff.

[10] **ID.—WHEN BURDEN OF PROOF ON PURCHASER.**—It is only where fraud or illegality in the inception of a promissory note is shown that the burden is upon the purchaser of such an obligation to prove that he purchased the note before maturity, in good faith, for value, in the usual course of business.

APPEAL from a judgment of the Superior Court of Stanislaus County. L. W. Fulkerth, Judge. Reversed.

The facts are stated in the opinion of the court.

Scott Rex for Appellant.

Hawkins & Hawkins for Respondent.

HART, J.—Plaintiff, an Illinois corporation, brought the action against defendant, a California corporation, to recover judgment on two promissory notes, each for four hundred dollars, dated December 4, 1915, payable to the Partin Manufacturing Company and alleged to have been duly indorsed and delivered by the payee to plaintiff prior to maturity. Judgment was in favor of defendant, from which judgment plaintiff prosecutes this appeal.

The Modesto Drug Company was engaged in the retail drug business in the city of Modesto. The capital stock of the corporation, with the exception of one share, was owned equally by J. T. Skow and D. W. Morris. Mr. Skow was a pharmacist and was president of the defendant corporation. He was called as a witness for plaintiff and testified that he was manager of the business, discharged the general duties pertaining to the conduct of the business, bought and sold goods, and had charge of the advertising.

In the fall of 1915 Skow had some negotiations with a representative of the Partin Manufacturing Company, of Memphis, Tennessee, and, on the 4th of December, 1915, a contract in the form of a letter addressed to the Partin

Manufacturing Company was signed "Modesto Drug Co., Purchaser, by J. T. Skow," and also contained the signature of the salesman of the Partin Company. Portions of said contract are as follows:

"Please ship to us at your earliest convenience by freight f. o. b. factory the following goods as described below:

"Capital prize, 2 passenger roadster. The purchaser is to deliver to the winner in this trade campaign the winner's choice of the following automobiles: Partin-Palmer, Monroe, Chevrolet. . . .

"Second prize, one ladies bracelet watch. . . . Third prize, one three piece French Ivory toilet set." Fourth and fifth prizes were named and ten dinner-sets. Advertising matter to be furnished by the Partin Company was specified.

"(1) The undersigned purchaser warrants that his sales for the past twelve months were \$20,000. On this warranty of sales, Partin Manufacturing Company hereby agrees to increase the purchaser's sales and collections not less than \$12,500. in the next twelve months. Partin Mfg. Co. agrees to refund 6 cents on every dollar the purchaser falls short of the \$12,500. increase and agrees to send their bond to purchaser's bank in the sum of \$800. to guarantee this agreement guaranteed by some surety company or bank satisfactory to company. Partin Mfg. Co. reserves the right to increase the number of premiums, without cost to the purchaser, if in their opinion it is necessary to bring about the above guaranteed increase. Partin Mfg. Co. agrees to send a bank certificate of deposit to purchaser's bank for \$400. to be held by purchaser's bank as a guaranty that Partin Mfg. Co. will deliver the automobile chosen by the winner in this campaign. Partin Mfg. Co. agrees to send a personal representative to assist in getting candidates and helping start this trade campaign."

There followed stipulations on the part of the purchaser as to the receipt of goods, making reports, etc. "The attached notes are executed and tendered in settlement of this order, and Partin Mfg. Co. is authorized to detach the same on acceptance of this order."

The notes in suit, attached to the above instrument, had been cut therefrom prior to the commencement of the action. The first note reads as follows:

“P. O. Modesto, Calif.

“December 4, 1915.

“\$400.00

“Five months after date for value received we promise to pay to the order of Partin Manufacturing Company Incorporated Four Hundred Dollars ————— Union Savings Bank, Modesto, California.

“MODESTO DRUG Co.

“By J. T. Skow.”

(Eight cents revenue stamps attached.)

The second note was identical with the first except that it was payable six months after date.

Witness Skow testified that the representative of the Partin Company explained to him the methods by which the defendant's business was to be increased, consisting of advertising, voting contests for prizes, etc.

The court found that the defendant did not execute or deliver to the Partin Manufacturing Company the notes in question or any promissory notes; that J. T. Skow made and delivered the notes in suit, but was not authorized by the Modesto Drug Company so to do and had no power or authority to execute them; that the Modesto Drug Company never at any time ratified the execution of said notes “and is not estopped from denying the execution of said written instruments by J. T. Skow”; that the consideration for said promissory notes and the contract above referred to has failed; that the Partin Manufacturing Company did not ship at any time to the Modesto Drug Company any automobile or any of the other articles mentioned in said contract; “that the consideration for said obligation has fully failed”; that at the time plaintiff acquired said promissory notes “it had knowledge of facts sufficient to put it on guard and to require it to make inquiry as to the authority of J. T. Skow to execute said written instruments and as to the consideration given therefor.”

Appellant contends that the notes were the notes of the defendant corporation; that if they were executed without authority, the execution and the delivery of the notes were ratified by defendant, and that appellant is a *bona fide* purchaser of the notes.

The by-laws of the defendant corporation were introduced in evidence. Article IV thereof provided: “The directors

shall have power . . . to incur indebtedness. . . . The terms and amount of such indebtedness shall be entered on the minutes of the board, and the note or obligation given for the same, signed officially by the president and secretary, shall be binding on the corporation. . . . The president . . . shall sign . . . all contracts and other instruments of writing which have been first approved by the board of directors."

On April 7, 1916, while the advertising and voting contest was still being carried on, Skow sold all his shares of the capital stock of the defendant corporation to Morris, who signed an instrument stating: "I do hereby agree to pay all of the outstanding bills and accounts of the Modesto Drug Company and to save and hold harmless the said J. T. Skow from all indebtedness now due or owing, including current bills, notes and notes for advertising." Witness Skow testified that the words "notes for advertising" in said instrument referred to the notes in suit.

On the same day Morris wrote the Partin Manufacturing Company the following letter: "I have purchased all the interest of J. T. Skow in the Modesto Drug Company, from which company you hold two notes. I have agreed with Mr. Skow to pay all notes due from the corporation and he desires me to let you know of this fact, and I hereby notify you that I will pay said notes."

Skow testified that before he signed the notes he discussed the matter with Morris and that the latter said: "Well, if you think it is a good thing, go ahead." Morris denied having made this statement.

The deposition of Roland A. Crandall, president of the plaintiff corporation, was read in evidence. He deposed that, in the month of January, 1916, he purchased for the plaintiff, from the Partin Manufacturing Company, certain notes, including those in suit, paying therefor 92.71 per cent of their face value.

D. W. Morris, called as a witness for the defendant, testified that he and Skow owned, in an equal amount, all the shares of the stock of the defendant, except one share, which was in the name of a lawyer by the name of J. M. Walthall; that Skow, who was president of defendant, was a pharmacist by profession and had at all times active management of the business of the corporation, buying the goods and making all contracts for and on behalf of the defendant;

that he (Morris) spent practically all of his time in and about the store of the defendant and acted with Skow in an advisory capacity with respect to the business. Morris denied the statement of Skow that the latter, before the making of the contract with the Partin Company, discussed with him the proposition involving said contract, but admitted that Skow did tell him of the making of said contract the next day after it was entered into and executed. He further testified that the board of directors of defendant never held a meeting for the purpose of authorizing Skow to sign the notes; that the Partin Manufacturing Company did not furnish to the winner of the contest an automobile and that he (witness) gave the winner a check for \$545 in lieu thereof; that one of the prizes, an ivory set, was so inferior that witness replaced it with another set taken from the stock in the store; that some of the sets of dishes were sent to the defendant; that the certificate of deposit and bond mentioned in the contract were never furnished by the Partin Company. On cross-examination Morris testified that he thought there was some delay on the part of the Partin Company in getting the advertising scheme started, but "the matter was in his (Skow's) hands. He had signed the contract with them and I paid very little attention to it. Q. In your conversation with Mr. Skow when this subject was under discussion, did he state to you or inform you in any way of the extent of the financial obligation that the company had incurred or was supposed to have incurred—that is, the amount of it? A. Yes, sir. Q. And so you knew that there was outstanding what was or what might be a financial obligation to this Partin Manufacturing Company to the extent of eight hundred dollars? A. Yes; he told me that at the time he signed the contract. . . . Q. He did give you to understand that payment would have to be made in the course of a few months? A. I suppose he did. He told me he had the time extended. He had had the contract changed. Q. Yes; the printed contract, he gave you to understand, had been changed at his instance? A. Yes. Q. Did he state to you or inform you at that time that the obligation was evidenced in the form of a note or notes? A. He told me that he had signed the notes." Morris testified that he addressed the following letter to the Partin Manufacturing Company, at Memphis Tenn., under date of January 12, 1916, and mailed the same

on said date: "Dear Sirs: We have not heard anything from you regarding the starting of the contest. We wish to get action on it as soon as possible, as some of our competitors have heard of what we are going to do. We have a tentative list of candidates ready for you." The said letter was signed, "Modesto Drug Co., by D. W. Morris." The witness said that the Partin Co. forwarded to defendant some of the prizes they agreed to provide it with, but that in quality they did not measure up to the agreement. He also testified that the company had sent one of its employees (a woman) to Modesto to assist Skow in prosecuting the contest; that that party accompanied Skow through the country about Modesto and assisted him in "stirring up" an enthusiastic interest among the people in the contest; that later a man by the name of Prindville was sent to Modesto by the Partin Company to assist in making the contest a success, but that he remained in Modesto but a few hours. On the twenty-fifth day of April, 1916, a letter signed "Modesto Drug Co., by D. W. Morris," was addressed and mailed by Morris to the Partin Company, and in that letter Morris stated that "we have not had a word from you regarding the contest for a long time," and further said that "Mr. Skow, who is no longer connected with the Modesto Drug Co., and who has been actively engaged in the conduct of the campaign, informs us that he wrote you some three weeks ago that some action would be necessary to put some life into the campaign. The time is now getting short and some quick action is necessary. . . . Expecting to hear from you at once, we are," etc. To that letter, the Partin Company replied, by letter under date of May 14, 1916, and after therein acknowledging receipt of Morris' letter of April 25th and stating that "we note that you state that Mr. Skow is no longer connected with your firm," the letter proceeded, in part: "We would be glad to have you send the names and addresses of your candidates who are in the campaign and also let us know about how active each candidate is and we will be glad to write them a special letter. We would be glad to have you do a little personal work with your candidates and explain to them that the close of the campaign is drawing near and that someone must get busy and win this car. If you think that by offering a vacuum cleaner to the public at large—to the one estimating the nearest correct amount of the votes cast the last month in

your campaign, would help the campaign, we will be glad to express you one of these vacuum cleaners immediately. In the meantime, we hope your campaign will show a great improvement and we would like to hear from you by return mail."

On further cross-examination, Morris repeated that, at the time he purchased Skow's stock in the defendant, he and Skow discussed between them the notes executed and delivered to the Partin Company by the defendant or Skow. "Q. And it was in view of the existence of those two outstanding notes," counsel for the plaintiff asked Morris, "that at that time you executed and delivered to Mr. Skow those two papers which have been offered in evidence here this morning by me, marked plaintiff's exhibits 1 and 2, which your counsel showed you here? A. Yes." (The exhibits, 1 and 2, referred to were the agreement between Skow and Morris setting forth the consideration and conditions for the sale of the former's stock to the latter and the letter written by Morris to the Partin Company, after said sale, informing said company that he had assumed liability for the payment of the notes in question.)

The above statement of the testimony and of the undisputed facts, to which may be added the further statement that it appears in the evidence that the increase of sales during the time the contest was in progress amounted to about two thousand five hundred dollars, is sufficient for the purposes of the consideration and decision of the points involved in this appeal.

The learned trial judge, in deciding the case, filed a written opinion, which has been incorporated in the record here. Therein he based the decision of the controversy upon the grounds: 1. That the notes were not those of the defendant; 2. That there was a failure of consideration for the notes, and in this particular connection it is argued both in the judge's opinion and in the respondent's brief that the plaintiff, at the time of purchasing the notes, had knowledge of facts sufficient to put it upon inquiry as to the consideration.

The argument advanced in support of the proposition first above stated is that, since the notes were made and delivered by Skow without any formal action of the board of directors of the defendant authorizing the notes to be issued and delivered or the contract upon which they were made and de-

livered to be executed, the notes cannot be held to be legal obligations of the defendant.

The evidence shows—indeed, it is admitted—that, at the time the transaction constituting the basis of this litigation took place, Skow and Morris were, practically, the defendant—that is, the corporation itself. They owned all the stock but one single share, which, as is often so with so-called “close corporations,” was put in the name of attorney Walthall undoubtedly for the sole working purposes of the corporation. There can be absolutely no doubt that, when making the contract and the notes in question, Skow was not acting for himself individually, except in so far as he was interested in the defendant as a stockholder, but was acting as agent of the defendant in his capacity as its president and manager. The sole purpose of the contract was, obviously, to build up or increase the volume of the business of the defendant and not to benefit a business in which he was interested other than as a stockholder in the defendant corporation. As a matter of fact, and to all practical intents and purposes, Skow and Morris were partners in the business of the defendant, although in legal contemplation they were, under the name of the defendant, a corporation. And the situation, in its legal aspect, was in no way changed by the act of Morris in purchasing the stock of Skow, except in the fact that Morris thus himself practically became the corporation. The corporation was a mere instrumentality adopted originally by Skow and Morris, and perpetuated by the latter when he became the sole owner of all the stock therein, through which they could the more conveniently transact their business. The defendant, as we have shown, received the benefits, whatever they were, flowing from the agreement in consideration of which the notes were given, and Morris was informed by Skow of the making of the agreement and of the terms thereof, according to his own testimony, the day following that upon which the agreement was made. He made no protest or objection against the agreement or the making thereof by Skow, and thus he approved and ratified the act of Skow, the president and manager of the defendant, in making the agreement. Here, then, we have a case where a party, serving in the dual capacity of president and manager of what well may be termed a “one-man” corporation, has made an agreement for and in behalf and in the name of the corporation, undoubtedly believing in good faith that in so

doing he was acting as the agent of said corporation, duly authorized to make such an agreement, and where said agreement or the act of making it has been tacitly, or by quiescence, acquiesced in by a party who, with said president and manager, owns practically all the stock of the corporation, after he has been put in possession by said manager of knowledge of the making of the agreement and of its terms and object, and where the corporation has received certain of the benefits flowing from said agreement. The question may be asked: May a corporation, whose capital stock is entirely owned, practically, by two persons, one of whom, being in the active management of the business of such corporation, has made an agreement for the benefit of the corporation and the other of whom has virtually indorsed or by conduct ratified it, refuse performance of its obligations under the agreement? Having received the benefits, or some of them, of an agreement obviously made *for it and for its benefit* (and ostensibly *by it*), with the consent and concurrence of the owners of substantially all its capital stock, will a corporation be permitted to dodge or escape liability for obligations arising upon such agreement by the plea that the contract was made without observance of the formal requisites or prerequisites prescribed by its charter or by-laws with respect to the making of contracts? The answer to these questions may be found in the principles of equity and justice applicable to such a case as we have here. Indeed, it would be deemed a hard rule or one of more than mere unsubstantial technical texture if the courts could not consistently break through it and so hold that a corporation is bound by a contract made under such circumstances as characterized the making of the contract in the present case. [1] But the books are replete with cases holding that where it appears that a corporation is but the instrumentality through which an individual for convenience transacts a particular kind of business, "not only equity, looking through form to substance, but the law itself, would hold such a corporation bound (where contracts are made under its name under circumstances similar to those here) as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation." (*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 214, [155 Pac. 986], and the many cases cited therein.) It is hardly necessary to do more herein than to

refer to the Llewellyn-Abbott case and the many cases cited therein as supporting that proposition. [2] It will suffice to say that in those cases it is held that where an obligation is created by the duly authorized agent of a corporation for such corporation, where most if not all of its capital stock is held and owned by one person, and the obligation is one the making of which is within the corporate powers of the corporation, and the act of making it is, therefore, not *ultra vires*, the corporation will be held bound to and liable for the proper execution of the terms of the obligation, notwithstanding that it may be shown that the act of making the agreement was not in strict accord with the adopted rules or the by-laws of the corporation with respect to such matters. But there is another rule, applicable to all corporations and which we think has application to the present case, which is stated in *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 250, [123 Pac. 212, 215], as follows:

“There is in the record before us no evidence from which it appears that any particular officer of the defendant was specifically authorized by the board of directors to execute promissory notes for and on its behalf. The very nature of commercial corporations, of which the defendant is a type, requires that the authority to transact their usual or ordinary business affairs shall be vested in some one or more persons. [3] A corporation is an artificial person, and where it is organized for commercial purposes its president or general manager or whoever may be given immediate direction or control of its affairs is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to do some particular act, which is included in the ordinary affairs of such a corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation authority to perform such particular act will be inferred from the general authority so given. [4] And where, as was clearly the case here, an officer of a corporation is held out by such corporation to be possessed of power to per-

form all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. (*McKiernan v. Lenzen*, 56 Cal. 61; *Phillips v. Campbell*, 43 N. Y. 271; *Seeley v. San Jose Independent Mill & Lumber Co.*, 59 Cal. 22, 24; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 332, [4 Pac. 106]; *Jennings v. Bank of California*, 79 Cal. 323, 328, [12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852]; *Greig v. Riordan*, 99 Cal. 316, 323, [33 Pac. 913]; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 162, [41 Pac. 855]; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 672, [49 L. R. A. 647, 60 Pac. 439]; *Siebe v. Hendy Machine Works*, 86 Cal. 390, 392, [25 Pac. 14].)"

In *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 387, [89 Pac. 87], it is said: "The majority of the board having knowledge of the facts, it was not necessary, to conclude the company defendant in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. (*Pixley v. Western Pacific R. R. Co.*, 33 Cal. 184, 186, [91 Am. Dec. 623]; *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 275; *Gribble v. Columbus Brewing Co.*, 100 Cal. 69, 72, 73, [34 Pac. 527]; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, [103 Am. St. Rep. 72, 77 Pac. 817].)" (See, also, *Cyclops I. Works v. Chico Ice etc. Co.*, 34 Cal. App. 10, 14 et seq., [166 Pac. 821].)

In *Doerr v. Fandango Lumber Co.*, 31 Cal. App. 318, 325, [160 Pac. 406, 409], this court said: "Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, however informally, of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognizing the validity of the agreement—as, for instance, accepting some of the benefits or assuming some of the burdens

thereof. In such cases, quite obviously, the principal will be deemed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions, notwithstanding that he has not in express language or in a formal manner ratified the contract. The case here comes within the principle thus referred to. The giving of the mortgage was not an *ultra vires* act, and there is no claim that it was. If the act involved the making of an invalid contract, it was, as shown, merely because of the manner in which it was attempted to perform the act or make the contract, and, like any other contract, it is capable of being ratified by conduct or a recognition in some manner of the obligation."

Morris himself testified, as seen, that Skow was the president of the corporation and the manager of it and its business; that he (Morris) knew nothing of the drug business or of the profession of pharmacist, and that the entire management of the concern in all its aspects was in the hands of Skow, although he (Morris) was about the establishment much of the time and acted with Skow in an advisory capacity. Thus it is clear that the corporation was not only under the immediate control and management of Skow but that he was held out as such to the public, with authority to transact for the corporation all the usual and ordinary business matters coming within its purposes and objects. Certainly, it will not be denied that Skow possessed general authority to transact and carry out such business matters of the defendant as in his judgment would tend to increase the volume of the business of the corporation and thereby augment its income and profits.

[5] It is not material to inquire whether the acceptance of benefits arising from an obligation, the making of which was in excess of the authority of the party receiving and accepting such benefits, amounts to a ratification or has the effect merely of creating an estoppel whereby the acceptor will be precluded from setting up the plea of want of authority to make the obligation to relieve himself of the burden imposed upon him by the obligation. The legal effect of either ratification or estoppel in such a case is precisely the same. Our Civil Code, section 1589, declares in effect that in such case there is a ratification. But, be that as it may, if we were to be driven from the position in this case to which

the facts firmly affix us, viz., that the transaction culminating in the execution of the agreement and the notes concerned here represents practically the corporate act of the defendants, it being, admittedly, a transaction within the scope of its corporate powers, we would, nevertheless, find ourselves buttressed by unimpeachable reason in holding that the act of the defendant in accepting the benefits of the agreement amounted to a consent to all the obligations thereof and if, therefore, there was not thereby in law a ratification of the transaction, the defendant is, by its act of accepting the benefits of the obligation, estopped from denying the binding force thereof upon it. In other words, an estoppel by conduct, or *in pais* by reason of the conduct of the defendant in accepting the benefits of the agreement for which the notes were given, was raised against the right of the defendant to object to the enforcement of the notes on the ground that their execution and delivery had not been duly authorized by the defendant. (*Curtin v. Salmon River etc. Co.*, 141 Cal. 308, 312, [99 Am. St. Rep. 75, 74 Pac. 851], and cases cited therein; and, also, *Doerr v. Fandango Lumber Co.*, 31 Cal. App. 318, 324 et seq., [160 Pac. 406] *supra*; *McQuade v. Enterprise Brewing Co.*, 14 Cal. App. 315, 318, [111 Pac. 927]; *Standard Oil Co., v. Slye*, 164 Cal. 435, 446, [129 Pac. 589].)

We should now pay brief attention to the conduct of Morris with respect to the transaction involved herein at and after the time he purchased the stock of Skow, and thus practically became the sole owner of the corporation. We have shown that Morris admitted that Skow told him of the fact of entering into the agreement and of the terms thereof the day following that upon which the transaction was completed, and that Morris made no objection or protest of any kind against the transaction, being evidently accustomed to defer, as to such matters, to the judgment of Skow, who was the active manager of the defendant. We now again call attention to the conditions as set forth in their agreement, upon which the sale of Skow's stock to Morris was made. In that agreement, Morris expressly assumed liability for all the outstanding debts and obligations of the defendant, including the notes in question. Not only that, but he later addressed to the Partin Company a letter in which he stated that he had purchased Skow's stock and that he had assumed liability for the payment of the notes in suit. When that letter was written

he was, as stated, the sole owner of practically all the stock of the defendant. Can it for a moment be doubted from all this that Morris expressly affirmed and confirmed, not alone for himself but for his corporation, the agreement made by Skow for the corporation and all its terms? He not only expressly recognized the agreement as a valid and legal one in all respects, but likewise assumed the obligations created thereby; and it would amount to a mere play upon words to construe the expressions contained in his letter to the Partin Company as evidencing an intention to recognize and confirm the agreement as anything other than what it purports to be, viz., the agreement of the defendant, made for and on its behalf for the sole benefit of its business.

[6] The foregoing is a sufficient reply to the contention that the notes in suit were not supported by a consideration, although, so far as the plaintiff is concerned, it would be a matter of no consequence whether there was in point of fact a consideration supporting the notes, if it purchased the notes for value without knowledge of such want of consideration at the time of such purchase. A written instrument is itself presumptive evidence of a consideration (Civ. Code, sec. 1614), and where there is not in the possession of a purchaser of a promissory note knowledge of any infirmity in the paper on the score of consideration, or of facts, which, when followed with reasonable diligence, would lead to the discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an innocent purchaser for a consideration, and so may enforce payment thereof. (Civ. Code, sec. 3122; *Kunz v. California Trona Co.*, 169 Cal. 348, [146 Pac. 883], *Pacific Portland Cement Co. v. Reinecke*, 30 Cal. App. 501, [158 Pac. 1041]; *Heney v. Sutro*, 28 Cal. App. 698, [153 Pac. 972]; *Jones v. Evans*, 6 Cal. App. 88, [91 Pac. 532]; *Eames v. Crosier*, 101 Cal. 260, [35 Pac. 873].)

But there is really no claim made that the notes in question were not executed and delivered to the Partin Company for a sufficient consideration. It is the contention, though, and the court so found, that there was a failure of consideration and that, when the plaintiff purchased the notes it had knowledge of facts sufficient to put it upon inquiry as to the consideration and thus have had disclosed to it not only that

the consideration for the notes had failed but that the obligations were not those of the defendant corporation. The facts referred to are that the notes in question did not bear the corporate seal of the defendant, that Skow did not sign the contract by or under his official designation, and that the plaintiff, instead of taking the notes by the usual or customary indorsement in the case of the transfer of title to negotiable instruments, required a bill of sale of them, with a guaranty that they would be paid. The fact of the absence of the seal, it is contended, was sufficient to inspire in the plaintiff distrust as to the legal integrity of the obligations, and the circumstance last mentioned, it is said, negatives the theory that the plaintiff took the notes in good faith. These propositions, for reasons to be given, are not important to the decision of this case, but they are vigorously pressed, and we will briefly notice them.

[7] We attach no significance to the fact that to the notes the seal of the defendant was not affixed. The fact is neither conclusive evidence of a want of authority for the execution of the notes for the corporation, nor a circumstance sufficient to create even a suspicion that the notes were wanting in a consideration or that their consideration had failed at the time of their transfer to the plaintiff.

[8] It is now the rule, generally, if not universally, recognized and followed throughout the American states as well as in England, that corporations of all kinds may be bound by their contracts, not under their seals. The rule in former times was (as the cases show) that a corporation could not express its will, or enter into a contract, except through an instrument under seal, executed by a duly constituted agent. (Thompson on Corporations, 2d ed., sec. 1920.) The modern and by far the more sensible rule is, however, that the seal of a corporation itself performs no further or greater function than to impart *prima facie* verity of the due execution by the corporation of written obligations—that is, it merely stands as *prima facie* evidence that the contracts made by corporations were executed by their authority—and no longer is a seal held to be indispensable to the execution of valid contracts by corporations. It is a matter of common knowledge that many contracts made by corporations and unattested by their seals are enforced. The books are full of such cases. The fact that such a contract was duly authorized by a corporation

may be shown by parol. There is, therefore, nothing in the fact that a contract purporting to be that of a corporation is not authenticated or attested by its seal which would necessarily justify even a suspicion that it was not executed by authority of the corporation. [9] Nor, in our opinion, does the fact that the plaintiff took a bill of sale of the notes with a guaranty from the Partin Company that they would be paid, in lieu of the customary indorsement in such a case, constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be. We, therefore, do not concur in the view of the trial judge that that fact negatives the theory that the plaintiff took the notes "in due course of business before maturity for value and without notice." The plaintiff, it appears, is in the business of buying negotiable paper, and it may be that it is its uniform custom and policy to require a bill of sale of notes purchased by it with a guaranty that the obligations are valid and will be paid. Indeed, one might acquire the ownership of such obligations without knowledge of whether the makers thereof were solvent and able to meet them, and in such case it would only be good business judgment to demand a guaranty or some protection against loss in case they proved worthless obligations for any reason. We do not know what actuated the plaintiff in thus fortifying itself against loss in the transaction, but we think it clear that that circumstance itself was not such as to indicate that the plaintiff was not an innocent purchaser of the notes for value.

But, as above stated, the matter just considered we do not deem of any particular consequence, so far as the decision here is concerned. The proposition that the notes were not those of the defendant we disposed of in the outset of this discussion and nothing further need be said of it, although we may well add to what we have already said on that question that, even if the plaintiff had made an inquiry into the question of the validity of the notes the result would only have been to discover that Skow was the president and the manager of the defendant; that, acting as such, he made the agreement and the notes for defendant and for the sole benefit of its business, and that the agreement and the obligations arising thereupon against the defendant were approved by Morris, who, with Skow, owned practically the entire capital stock

of the defendant; that the defendant's business increased to some extent in volume as a result of the action of the Partin Company under the agreement. Knowledge of these facts by the plaintiff, when it bought the notes, would not, of course, have made it any the less an innocent purchaser for value.

With regard to the matter of the alleged failure of consideration, as to which it is claimed that the plaintiff, when it bought the notes, had knowledge of facts sufficient to put it upon inquiry to ascertain whether the consideration had then failed, it is to be said that there is no evidence in the record showing or tending to show that there was such failure.

The evidence, without conflict, shows that the plaintiff purchased and became the owner of the notes before their maturity, and before the contract between the defendant and the Partin Company had been completed. In other words, the plaintiff bought the notes before the purpose of the agreement was accomplished and while the steps essential to the accomplishment of that purpose were still in progress. If, then, there was a failure of consideration for the notes, it was, of course, in the failure of the Partin Company to comply with the terms of the contract between it and the defendant, and, therefore, such failure of consideration occurred, if at all, long after the plaintiff became the owner of the notes. The correspondence between Morris and the Partin Company, in which the former complained to the latter of its inertness in the matter of prosecuting the prize contest, took place subsequently to the time at which the plaintiff bought the notes. In brief, as above stated, the contract, in consideration of which the notes were issued, was still in process of execution on the part of the Partin Company at the time the plaintiff purchased the notes, and there was not then nor could there have been, either a total or even partial failure of consideration. Of this fact it may be that the plaintiff was aware at the time it bought the notes, but if it was without knowledge of the fact and for any reason had prosecuted an investigation to determine the legal status of the notes, it would thus have readily learned that fact and still have learned no valid reason why it should not have purchased the notes and acquired title thereto by the transfer free from any infirmity, so far as consideration was concerned.

The cases cited by respondent, of which there are many, we have examined and found to be very different from this case

as to the facts. For instance, in the case of *Burns v. Bauer*, 37 Cal. App. 251, [174 Pac. 346], fraud was charged, proved, and found as characterizing the very transaction eventuating in the execution and delivery of the note sued on therein; and not only was that true, but the court found upon ample evidence that the plaintiff, a lawyer, who was the assignee of the note, was familiar with facts extrinsic to the note itself which were of a most suspicious character and which, if followed up with reasonable diligence, would have disclosed that the note was procured by the corporation to which it was given through false and fraudulent representations. In fact, it was found that the attorney for the plaintiff was the secretary of the corporation in whose favor the note was executed at the time the note was procured, and it was further found that plaintiff, while making inquiry as to the ability of the maker to pay the note (and it was also found by the court that the maker was amply able to pay it), made no inquiry as to whether said note was valid. [10] And, in this connection, we may add, though we conceive it to be of no special importance in view of the views of the transaction involved herein we have expressed, that it is only where fraud or illegality in the inception of a promissory note is shown that the burden is upon the purchaser of such an obligation to prove that he purchased the note before maturity, in good faith, for value, in the usual course of business. The rule, indeed, applies to a case only where there has been an illegal consideration and not where there has been a valid consideration and it has failed. This is clearly shown by the reason upon which the rule proceeds, as it is formulated by the authorities, viz.: "The presumption is (in case of fraud or duress, etc., in the procurement of the note) that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it for his benefit; and such presumption operates against the holder, and it devolves upon him to show that he gave value for it. So where the note was given for a distinctly illegal consideration." (Parsons on Notes and Bills, 188, 189; *Graham v. Larimer*, 83 Cal. 173, 178, [23 Pac. 286]; *Jordan v. Grover*, 99 Cal. 194, 195, [33 Pac. 889]; *Bailey v. Bidwell*, 13 Mees. & W. 73, 32 Eng. L. & Eq. 134.)

It is, of course, clear that this case does not come within the above-considered rule. Here, as the evidence indisputably

shows, and, indeed, as is in effect conceded to be the fact, the notes involved were not procured by fraud or duress or without a valid consideration. It is also clear, as we have pointed out, that the plaintiff acquired ownership of the notes for value before their maturity and before there could have been a failure of the consideration for which they were given.

We conclude, upon the record before us, that to deny the right of plaintiff to recover upon these notes would mean a failure of justice.

The judgment is, therefore, reversed and the cause remanded.

Chipman, P. J., and Burnett, J., concurred.

[Civ. Nos. 2954 and 2961. First Appellate District, Division One.—
September 5, 1919.]

NORTH PACIFIC STEAMSHIP COMPANY (a Corporation), Appellant, v. TERMINAL INVESTMENT COMPANY (a Corporation), Respondent.

- [1] LANDLORD AND TENANT—DEPRIVATION OF ENJOYMENT OF SUBSTANTIAL PORTION OF DEMISED PREMISES—CONSTRUCTION OF FINDINGS. In this action by a tenant to have a lease declared rescinded, the effect of the finding of the trial court "that plaintiff has not suffered, or sustained, any material or substantial damage in any amount of money, or thing whatever, by reason of all, or any, of the acts complained of by plaintiff, and found by the court to have been done by defendant," when read with the finding as to the acts done, or suffered to be done, by the defendant, was that plaintiff was not deprived of a *substantial* as distinguished from an insignificant or inconsequential portion of the demised premises, or, in other words, deprived of the beneficial enjoyment of a *substantial* portion thereof.
- [2] ID.—NECESSITY FOR ACTUAL OUSTER—WHEN RULE INAPPLICABLE. Where the lessee is not deprived of the beneficial enjoyment of a substantial portion of the leased premises, the rule that "it is not necessary that there should be an actual ouster, to constitute an eviction, for any act of the lessor which results in depriving the lessee of the beneficial enjoyment of the premises will constitute an eviction," does not apply.

- [3] **ID.—OBSTRUCTION OF PASSAGEWAY BY OTHER TENANTS—TRESPASS.**
In this action by a tenant to have a lease declared rescinded, the acts of defendant's tenants, who occupied the adjoining premises, in obstructing the passageway, or "open space," leading to plaintiff's premises by hanging and displaying therein a café lunch-sign, two feet wide, and about six feet in height, during certain hours of the day, amounted to no more than a mere trespass.
- [4] **ID.—TRESPASS NOT BREACH OF COVENANT.**—No acts of molestation, even if committed by the landlord himself, or by a servant at his command, amount to a breach of the covenant of quiet enjoyment and possession, unless they are more than a trespass.
- [5] **ID.—PASSING TRESPASS—EVICTION.**—A mere passing trespass cannot operate to so oust a tenant of his possession as to amount to an eviction or a dispossession.
- [6] **ID.—INDUCEMENT FOR MAKING LEASE—OBSTRUCTION OF PASSAGEWAY—FINDINGS NOT INCONSISTENT.**—In this action by a tenant to have the lease declared rescinded, the findings of the trial court to the effect that the continued existence of the passageway, or "open space," leading to the leased premises was a material part of the consideration for the obligation of plaintiff under said lease, and constituted a material inducement to plaintiff to enter into the same, and that the obstruction of such passageway for a period of not exceeding twenty-one days did not work a failure of any material or substantial part of the consideration to plaintiff for its lease, and that plaintiff had sustained no substantial or material injury or damage by reason of the obstruction, or by reason of any of the acts complained of, were not inconsistent and contradictory.
- [7] **ID.—RESCISSION—REVIVAL BY LESSOR.**—The principle of law that after the lessee has determined to rescind the contract, and given notice to the lessor that the lease is ended by reason of the latter's failure to comply with its terms, the termination of the lease is complete, and the lessor cannot thereafter by any act of its alone renew the lease by removing the cause of the alleged eviction by the lessor, is applicable only where the lessee has good cause for rescission.
- [8] **ID.—EVICTION—RIGHT OF RESCISSION.**—An eviction must be established before the right of rescission of the lease springs into being.
- [9] **ID.—WANT OF EVICTION—ABATEMENT OF TRESPASS—EVIDENCE.**
In this action by a tenant to have a lease declared rescinded, the trial court having found that an eviction had not occurred by

3. Constructive eviction resulting from positive overt act of landlord, notes, 7 Ann. Cas. 593; 19 Ann. Cas. 690; 7 A. L. R. 1103.

reason of the acts of trespass committed by the other tenants, was right in permitting the defendant to show the circumstances under which the trespass was abated.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a motion for an order vacating and setting aside said judgment. George E. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Aitken, Glensor & Clewe and Aitken, Glensor, Clewe & Van Dine for Appellant.

J. P. Langhorne for Respondent.

WASTE, P. J.—This action was brought by plaintiff, the tenant, to have a lease declared rescinded, because it claimed to be deprived of a material part of the consideration, which had failed, so it is alleged, through the fault of the lessor. Judgment was entered for the defendant. There are two appeals, one (No. 2954) from the order denying plaintiff's motion to vacate the judgment, and the other (No. 2961) an appeal from the judgment. By stipulation, the appeals are considered together.

Defendant's assignor leased to plaintiff the premises, No. 50 Market Street, San Francisco, to be used as a ticket-office, for the term of eight years and eight months, commencing July 1, 1913, and ending February 28, 1922. At the time the negotiations for the lease were begun, a dividing wall of the building between the leased premises and a café and cigar-stand, occupying No. 48 Market Street, immediately adjoining, extended to a column at the street line. Before taking the lease, plaintiff insisted that the entrance be changed by cutting out two feet of this dividing wall next to the column from floor to ceiling, so that there would be two entrances, or vestibules, at No. 50 Market Street—one opening directly on Market Street, as before, and a new one opening into and across the adjoining premises, occupied by the cigar-stand. The lessor acceded to these requirements, and the change was made. The purpose of plaintiff in obtaining the second entrance was to gain the advantage of having its premises, displays, and advertising matter more readily seen by passers-by.

Plaintiff alleged, as ground for rescission, that defendant caused and permitted the tenant of the adjoining premises, No. 48 Market Street, to obstruct this passageway, or "open space," by hanging and displaying therein a café lunch-sign, two feet wide, and about six feet in height, during certain hours of the day. It claimed that by reason of such obstruction the consideration for its obligation under the lease failed in a material respect.

It was testified to by witnesses on behalf of plaintiff that on account of the position of the open passageway formed by the alteration the door and a window of the premises being thereby placed in better view of and more easily seen by people walking out Market Street from the ferry, this passageway and the view of the place thus gained through the open space were much more important in plaintiff's estimation than the regular entrance on Market Street and the Market Street windows. It was because of its advertising value that plaintiff insisted on having the vestibule made.

On January 28, 1918, plaintiff, with the consent of defendant, sublet the premises to be used as a photographic gallery, with the understanding that if the business was not a success, the subtenants might move out. When the subtenants inspected the premises before renting, there was no obstruction of the passageway. When it appeared on the first day of their tenancy, the photographic people complained to plaintiff because of its being there. Plaintiff requested defendant to remove the sign. Defendant did not do so, and after a few days the subtenant, complaining that the sign, when in position, rendered their premises dark, and deprived them of their advertising space, demanded of plaintiff the return of the rent that had been paid by them, and on its being refunded, they moved out.

The trial court found that the continued existence of said open space, and said right of way, and unobstructed view by passers-by, through and across said space, and of said portion of the corridor was and were a material part of the consideration for the obligation of plaintiff under said lease, and constituted a material inducement to plaintiff to enter into the same; that plaintiff would not have entered into the lease had it not included the right of such unobstructed view through and across said open space. It further found that the obstruction in the open space complained of by

plaintiff, and which consisted of a sign, advertising the lunch in the café at No. 48 Market Street, was placed by the subtenant of defendant within the interior boundaries of the vestibule and entrance from Market Street to the café; that the sign which was first placed in that position on the twenty-fifth day of January, 1918, was only maintained over and across the open space from about 11 o'clock to 2 P. M. of each day; that the sign was placed across the open space without the knowledge or consent of defendant, which had no knowledge of the fact until the fifth day of February, 1918, when plaintiff first complained to defendant about the matter; that defendant at first declined to take any action in the matter, but upon further investigation on the fifteenth day of February, 1918, caused the café people to remove the sign from the passageway, and thereafter it was kept entirely free from any obstruction whatever, and that plaintiff was fully notified that the obstruction had been removed from the open space, and that same was unobstructed.

Two days before receiving this notification, however, plaintiff had delivered its notice of rescission.

The court further found that the obstruction of the open passageway for a period not exceeding twenty-one days did not work a failure of any material or substantial part of the consideration to plaintiff for its lease, and that plaintiff had sustained no substantial or material injury or damage by reason of the obstruction, or by reason of any of the acts complained of. Judgment in favor of the defendant followed.

In explanation of its action in first declining to take steps to have the offending café sign removed from the passageway, after complaint made by plaintiff, the defendant, before plaintiff served its notice of rescission, took the ground that the opening in the partition wall was made after plaintiff took possession. After notice of rescission was served, and after investigating and finding that the opening existed at the time the lease to plaintiff was made, it took steps to cause its tenant at No. 48 Market Street to remove the sign complained of. It so notified plaintiff, and refused to rescind the lease or accept surrender or possession of the premises.

In support of the finding that no material or substantial part of the consideration to plaintiff failed, because of the obstruction of the open space by the café sign, respondent first points out that the lease was for a period of eight years and eight

months, and the obstruction continued but a portion of the day for about twenty-one days, being promptly removed after defendant had opportunity to look into the matter. Respondent in the next place relies upon the evidence introduced at the hearing, consisting of a number of photographs and diagrams, the testimony of a number of witnesses, and the view of the premises had by the court during the trial. While there was evidence on the part of plaintiff that but for the construction of the passageway leading into the vestibule at No. 48 Market Street, plaintiff would not have leased the premises, and that the existence of such passageway was of material benefit in the way of giving better light to the store, and affording a more open view of the place by pedestrians approaching from the east along Market Street, there was a strong counter-showing that the passageway in the east wall, two feet wide, afforded but little light, sight, and passageway into the place; that obstruction of this open space would only interfere with the view of persons coming from the east along Market Street, into a very small window, and the door of the store, until such time as they had passed the column on the edge of the sidewalk before referred to; that the space was too small for an entrance and was rarely used as such; that in addition to the small window and the door there are three other windows, one quite large, giving ample light and sight into the premises, and that the original vestibule to the store is five feet wide, ample for the purposes for which it was and is intended, and has always been used for the main entrance. Furthermore, before the place was occupied by the tenants, who moved out on account of the alleged injury caused by the display of the café sign, the premises had been empty for some time, and it was while the store was vacant that the café people first put up the lunch-sign on a board hung on hooks in the passageway. On the evidence, therefore, the lower court was justified in finding as it did that no material injury was done to plaintiff.

Appellant's chief contention is that the amply supported findings of the lower court to the effect that the existence of the open passage was a material inducement in the matter of the lease of the premises, and the other finding that by reason of the obstruction of the same passage in the manner complained of, plaintiff suffered no material detriment, are

diametrically opposed and so fatally inconsistent as to require a reversal of the judgment.

There can be no quarrel with appellant's statement of the law applying generally to the right of rescission in cases of contracts induced through fraud, mistake, and false representations. Those principles are not applicable to the case in hand. We cannot find that either fraud, mistake, or false representations entered into the inducements which led plaintiff to enter into the contract. The covenant on the part of the lessor, which, if not expressed in the lease, was implied, was that plaintiff should have the quiet enjoyment and possession of the premises during the continuance of the term. (Civ. Code, sec. 1927; *McDowell v. Hyman*, 117 Cal. 67, 70, [48 Pac. 984].) The act complained of, therefore, arises out of the interference by defendant with the enjoyment by plaintiff of the open space or passage under circumstances amounting, so appellant contends, to a forcible eviction from the premises.

[1] While the trial court has not found in so many words that there was no eviction from a substantial portion of the demised premises, it did find "that plaintiff has not suffered, or sustained, any material or substantial damage in any amount of money, or thing whatever, by reason of all, or any, of the acts complained of by plaintiff, and found by the court to have been done, or suffered to be done by defendant." This finding must be read with the other finding that defendant did not "fail or refuse to maintain said open space, and to allow plaintiff to have said right of way, and said unobstructed view through and across said open space, and said portion of said corridor, or allow said open space to be closed or obstructed to a height of more than six feet, or to any height or at all, or at any time, during the business, or other hours of each day," except "that such café sign was so placed by Mollenhauer & Co., on or about the 25th day of January, 1918, and was only placed and kept over and across said open space from about 11 o'clock A. M. until about 2 P. M. of each day," until "on said 15th day of February, 1918, said Mollenhauer & Co. did remove its café sign from said" open space "and did leave the same entirely free from any obstruction whatever." When so read together, we are of the opinion that the effect of the findings must be that plaintiff was not deprived of a *substantial* as distinguished from an insignificant or inconsequential portion of the demised premises, or, in

other words, deprived of the beneficial enjoyment of a *substantial* portion thereof. [2] If it was not, the rule that "it is not necessary that there should be an actual ouster, to constitute an eviction, for any act of the lessor which results in depriving the lessee of the beneficial enjoyment of the premises will constitute an eviction" (*Agar v. Winslow*, 123 Cal. 587, 593, [69 Am. St. Rep. 84, 56 Pac. 422]; *Skaggs v. Emerson*, 50 Cal. 3) does not apply. (*Kelly v. Long*, 18 Cal. App. 159, 163, [122 Pac. 832].)

[3] If the interference with plaintiff's possession was no more serious than the findings indicate (and the sufficiency of the evidence to justify the findings is well established in our minds), the act of defendant's tenant can amount to no more than a mere trespass. [4] And it is the settled rule that no acts of "molestation, even if committed by the landlord himself, or by a servant at his command, amount to a breach of the covenant, unless they are more than a trespass." (Taylor's Landlord and Tenant, 9th ed., sec. 309.) The defendant at all times during its long lease enjoyed possession and occupancy of these premises, including the use of the open space in the dividing wall, except for the trifling period during which it was interfered with by the act of defendant's tenant in displaying the café sign during lunch hours.

"It most certainly cannot be justly said that this act amounted to an eviction of the defendant from a substantial portion of the demised premises, and should, therefore, operate as a suspension or extinguishment of the rent. (Taylor's Landlord and Tenant, sec. 309; *Ogilvie v. Bull*, 5 Hill (N. Y.), 54.) [5] A mere passing trespass cannot operate to so oust a tenant of his possession as to amount to an eviction or a dispossession." (*Kelly v. Long*, *supra*.)

[6] The two findings of the lower court, therefore, are not inconsistent and contradictory. While the quiet enjoyment and use of the passageway may have been an inducement to plaintiff to enter into the lease, the act of defendant, as found by the court, was a mere trespass, which did not constitute such a breach of the implied warranty of the lease as to work a failure of consideration, or amount to an ouster or eviction from any substantial portion of the premises, causing plaintiff material injury or loss. (*McCormick v. Potter*, 147 Ill. App. 487, 491; *Voss v. Sylvester*, 203 Mass. 233, 240, [89 N. E. 241]; *French v. Pettingill*, 128 Mo. App.

156, 161, [106 S. W. 575]; *Wilkes-Barre Realty Co. v. Levy*, 114 N. Y. Supp. 713.)

[7] Plaintiff first complained to defendant about the offending sign on February 5th. Defendant on the next day declined to act, on the ground that the opening in the wall had been made after the lease entered into by plaintiff, and for the benefit of the tenant occupying No. 48 Market Street. On further investigation it caused the sign to be removed on February 15th, and on the 16th so notified the plaintiff, who had served its notice of rescission on the 14th. Appellant contends, therefore, that any act of the defendant, after notice of rescission given, was ineffectual to revive a lease theretofore rescinded by one of the parties. It contends that as it had determined to rescind the contract, and had given notice to defendant that the lease was ended by reason of its failure to comply with its terms, the termination of the lease was complete, and defendant could not by any act on its part alone renew the lease by taking away the sign and thus removing the cause of the alleged eviction. Undoubtedly such principle of law is applicable in cases in which the ouster or eviction is established. An examination of those cases, however, will disclose that under the facts of each the lessee or tenant had good cause for rescission. Such was the holding in *McCall v. New York Life Ins. Co.*, 201 Mass. 223, [21 L. R. A. (N. S.) 38, 87 N. E. 582, 584], cited by appellant. There the lease was for the entire fourth floor of a building for a term of five years. The landlord agreed to keep the elevators in the building in repair and running. During the first year of the tenancy the elevators caused trouble. The evidence showed that they stopped at all hours of the business day, and remained so for from fifteen minutes to one-half of the day, sometimes at the top and sometimes between floors, holding the passengers imprisoned and unable to get out. The tenant abandoned the premises and moved out. The landlord sued for rent, claiming under the written lease. The tenant defended on the ground that he had been evicted. The court found that the faulty elevator service rendered the building practically unfit for the defendant's business. In approving judgment for the defendant, on appeal, the court said: "Findings would have shown an eviction at the election of the lessee, and it might rightfully abandon the premises and decline to pay further rent. (Citing cases.) Since the

tenant was evicted by the landlord he is not obliged to return, even if the cause of the eviction be removed; and no right to rent exists except upon a voluntary return of the tenant."

[8] This case well illustrates the distinction between the cases relied on by appellant, and the cases already cited by us, which hold that an eviction must be established before the right to a rescission of the lease springs into being.

[9] The trial court, in this case, having found against the plea of the plaintiff, that an eviction had occurred, was right in permitting the defendant to show the circumstances under which the trespass was abated.

The order by which the lower court denied plaintiff's motion for an order vacating and setting aside the judgment therein, and entering another and different judgment (No. 2954) is affirmed.

The judgment appealed from (No. 2961) is affirmed.

Richards, J., and Bardin, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 3, 1919.

All the Justices concurred.

[Civ. No. 2935. First Appellate District, Division One.—September 5, 1919.]

CITY OF OAKLAND (a Municipal Corporation), Appellant,
v. ALBERS BROS. MILLING CO. (a Corporation), Respondent.

[1] TAXATION—LEASE OF LANDS FROM CITY—CONSTRUCTION OF IMPROVEMENTS—OWNERSHIP—EXEMPTION FROM TAXATION.—Improvements constructed in accordance with the terms of a lease with a municipal corporation upon lands granted by the state to such municipality in trust for certain purposes under the provisions of an act of the legislature approved May 1, 1911 (Stats. 1911, p. 1258), are not subject to taxation where it is expressly provided in the lease that such improvements when so constructed shall become and remain the property of the municipality.

APPEAL from a judgment of the Superior Court of Alameda County. Edgar T. Zook, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Ezra W. Decoto, District Attorney, James M. Koford, Assistant District Attorney, H. L. Hagan, City Attorney, and John J. Earle, Assistant City Attorney, for Appellant.

Sullivan & Sullivan and Theo. J. Roche and Louis V. Crowley for Respondent.

Fitzgerald, Abbott & Beardsley, *Amici Curiae*.

RICHARDS, J.—[1] This action was instituted by the city of Oakland to collect from the defendant certain taxes alleged to be due said city. The cause was submitted to the trial court for decision upon an agreed statement of facts which may be summarized as follows: On February 16, 1916, the plaintiff and the defendant entered into a certain written lease of certain lands upon the western waterfront of the said city of Oakland, the same being a portion of the public lands granted by the state to the city of Oakland in trust for certain purposes under the provisions of an act of the legislature approved May 1, 1911 (Stats. 1911, p. 1258). By the terms of said lease the lessee was to construct certain substantial buildings and improvements consisting of a dock and warehouse, which were to be used by it during its tenancy of the premises, for which the lessee was to be repaid by a system of warehouse and dockage charges as specified in said lease, it being expressly provided therein that "The said dock and warehouse when so constructed shall become and remain the property of the lessor." It was upon these specific improvements that the tax officials of the city of Oakland undertook during the fiscal year 1917-18 to levy and collect the taxes which are the subject of this suit, and the sole question presented to the trial court, and to this court upon appeal, is as to whether the said improvements upon the said public property of the plaintiff is subject to taxation. The trial court held that it was not, and rendered its judgment

accordingly in the defendant's favor. From such judgment the plaintiff prosecutes this appeal.

The case upon which the appellant chiefly relies to sustain its contention upon this appeal is the case of *San Francisco v. McGinn*, 67 Cal. 110, [7 Pac. 187]. A careful examination of that case convinces us that it has no application to the case at bar, the essential difference between the two cases being that in the former case the court based its ruling that the defendant therein, who had placed the improvements in question upon the lands of the city of San Francisco, was to be held to be their owner for the purposes of taxation; while in the case at bar the improvements in question are expressly made the property of the city of Oakland, and hence the defendant herein could not have for any purpose any ownership in them. Under the express provisions of section 1 of article XIII of the state constitution, and also of section 3607 of the Political Code, the property of a municipal corporation in this state is not the subject of taxation. In the presence of these constitutional and statutory provisions it is needless to cite the earlier cases showing that this is and has long been the settled law of this state; but in the recent case of *San Pedro etc. R. R. Co. v. City of Los Angeles*, 180 Cal. 18, [179 Pac. 393], the supreme court declared void an attempted assessment of a breakwater built by a lessee of submerged public lands, as "improvements," holding that while, as conceded by the parties in that case, the breakwater was not an "improvement" within the meaning of section 3617 of the Political Code, even if it were so considered to be, it would be such an improvement as would become fixed to the realty itself, "the fee of which was in the state, and hence not subject to assessment."

Judgment affirmed.

Waste, P. J., and Bardin, J., *pro tem.*, concurred.

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[Civ. No. 2844. First Appellate District, Division One.—September 5, 1919.]

RODERICK McKENZIE, Respondent, v. A. NICHELINI et al., Appellants.

- [1] **PUBLIC LANDS—RE-ESTABLISHMENT OF GOVERNMENT CORNERS—USE OF PROPORTIONAL METHOD—NOT CONTROLLING ON STATE COURTS.**—The proportional method in re-establishing government corners as laid down by the surveyor-general of the United States is for the guidance of United States deputy surveyors in running lines in which the government is interested, and cannot control a state court in its choice of means for establishing the point where the government surveyor originally placed a section or quarter-section corner, when that question properly arises within its jurisdiction.
- [2] **ID.—CASE AT BAR—LOCATION OF CORNERS WITHOUT USE OF PROPORTIONAL METHOD.**—In this action involving the location of the dividing line between the north and south halves of a certain quarter-section of land, the trial court was justified in locating the quarter-section corners in question as it did without resort to the proportional method.

APPEAL from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge. Affirmed.

The facts are stated in the opinion of the court.

Albert A. Molfino, Percy S. King, Charles L. McEnerney and Leo J. McEnerney for Appellants.

John T. York for Respondent.

RICHARDS, J.—The plaintiff, being the owner of the south half of the northwest quarter and the north half of the southwest quarter of section 24, township 8 north, range 4 west, Mount Diablo base and meridian, brought an action in ejectment against the defendants, who claimed ownership of the south half of the last named quarter-section but who had entered into possession of land by virtue of such claim which, according to the plaintiff, constituted part of the north half of said southwest quarter.

The court, after a lengthy trial, in which much evidence was taken of surveyors and others as to monuments, witness trees, courses, distances and topography, found in favor of

the plaintiff, and gave judgment accordingly. The defendants appeal, their main contention being that the finding of the court as to the location of the plaintiff's land upon which its judgment is based is wholly unsupported by the evidence and is contrary thereto.

The deciding factor in the case, as admitted by the appellants, is the location of the line dividing the north and south halves of the southwest quarter of section 24 above referred to. According to the contention of the appellants, the true method for locating this line is first to find the legal center of the section—a point, as they remark, which is not set by the government surveyor, but which is found by running a straight line from the quarter-section corner on the north boundary of the section to the quarter-section corner on the south line thereof, and then by intersecting this line by one drawn from the quarter-section corner on the west side of the section to the opposite quarter-section corner on the east, the point of intersection of these two lines being the legal center of the section. Having thus obtained the interior boundaries of the four quarters of the section the north and south halves of the southwest quarter will be found by similarly intersecting that quarter-section by an east and west line equidistant from its north and south boundaries, to do which it is, of course, necessary to know in addition to the points already obtained the quarter corner on the south boundary of the section (identical with the southeast corner of the southwest quarter) and the southwest corner of the section (identical with the same corner of the quarter-section). It is the appellants' contention that the evidence offered by the plaintiff shows that the lines were not run in this manner, from which they argue that the court's finding as to the location of the line in dispute is not supported by the evidence.

It will be observed, however, that given a section of land 80 chains square the southwest quarter thereof will be bounded by four straight lines, each 40 chains in length, one running from the southwest corner to the west quarter corner of the section; a second running from the said southwest corner to the south quarter corner; a third running from the west quarter corner easterly and parallel to the last-mentioned line, and the fourth running from the quarter corner on the south northerly and paralleling the first-mentioned line. The

north and south halves of this quarter-section will be found by running a line from a point 20 chains north of the southwest corner to a point 20 chains north of the southeast corner thereof. And since the dispute between the parties to this appeal is only as to the location of the line between the north and south halves of the quarter-section involved in its relation to north and south the degree of extension easterly or westerly of this line becomes immaterial, for no right of appellants to land to the east or west of this quarter-section is in question, and the judgment of the court has not ejected them from any land so located.

Turning now to the evidence upon which the court based its finding as to the relative location of the north and south halves of this quarter-section, there is testimony in the record that the entire section is approximately 80 chains from north to south; that the plaintiff's surveyor for the purpose of locating the plaintiff's land started at the southwest corner of the section, which corner he had known as the established government corner for many years; from that point he ran north 20 chains and there located the westerly end of the line dividing said southwest quarter into north and south halves; from there he ran 40 chains north, and there located the westerly end of the line dividing the northwest quarter of the section into north and south halves; to ascertain the precise direction in which he should run the north and south boundaries of plaintiff's land (having ascertained that there were no established government corners on the east side of the section now to be found) he measured the whole township line from south to north between townships 3 and 4, the eastern boundary of section 24 being part of this line, and finding it seven chains short of the correct distance, he prorated the deficiency between the six sections on the east side of the township, which gave him as the direction in which the north and south boundaries of section 24 should be run a course north 83 degrees east. He accordingly ran two such lines 40 chains in length for the north and south boundaries of plaintiff's land, and joined the eastern extremities of these lines by a line parallel to the western boundary already described. This direction of north 83 degrees east, however, was not accepted by the court as correctly locating the plaintiff's land. The government field-notes of certain lines of the section in question were in evidence, among them the south boundary

thereof, which was a line run due east from the southwest corner of the section; and from testimony as to the topography of the land traversed by a line run east from said corner the court concluded that such testimony was sufficient to establish as the true direction of said south boundary a line due east as given in said field-notes, and in its findings adopted this direction for the north and south boundaries of plaintiff's land, the latter of which is the dividing line between plaintiff and defendants. It further appears that the northwest corner of this section as established by the government could not be found; but that a line drawn from the corner common to sections 14, 15, 22 and 23 (located one mile west of section 24) to a point on the east line of the township between said section 24 and section 19 in the adjoining township, located with reference to its relation to a known government corner further east, would pass through or very close to a point 80 chains north of the southwest corner of section 24, the distance called for by the field-notes for the northwest corner of the section. If we regard the north boundary of the section as being coincident with the eastern half of this line (and it is the only testimony in the record with reference to its location) a line drawn from the quarter corner on the north boundary of the section to the corresponding corner on the south boundary would be somewhat longer than 80 chains. If this excess were divided between the four equal parts of this line it would place the eastern extremity of the line dividing the north and south halves of the section a trifle to the north of where the court found it to be; but the error is so small that we think it is a case for the application of the legal maxim "The law disregards trifles" (Civ. Code, sec. 3533), and not of sufficient magnitude to warrant a reversal of the case.

The appellants' contention that the finding of the trial court as to the location of plaintiff's land is not supported by the evidence is also based upon the assertion that the southeast, northeast, and southwest corners, as also of all the quarter corners of section 24, are lost corners, which should be re-established by the proportional method in order to locate the line in dispute in this action. It is not necessary to agree with the appellants that the re-establishment of all of these lines is necessary in order to correctly locate the line in dispute, but their contention may be considered with refer-

ence to those corners which the trial court used in reaching its conclusion and which it found by methods other than that urged by appellants, viz., the quarter corners on the west and south sides of the section, and the section's legal center point.

[1] It may first be said that we think the appellants' contention as to the duty of the trial court to resort to the proportional method in re-establishing government corners is entirely too broad. The rule in this respect as laid down by the surveyor-general of the United States is for the guidance of United States deputy surveyors in running lines in which the government is interested. It cannot control a state court in its choice of means for establishing a fact, to wit, the point where the government surveyor originally placed a section or quarter-section corner, when that question properly arises within its jurisdiction. But this rule of the general land office is itself but a statement in detail, and perhaps an extension of a rule long followed by the courts of the country generally. In *Weaver v. Howatt*, 161 Cal. 77, 84, [118 Pac. 519, 522], our own supreme court has indicated the extent to which it will follow the rule. It is there said: "It is not the province of the court to determine where the corner should have been fixed. This is not an action to vacate the government survey. It must be assumed that the line was measured and the monuments set. Their positions as set fix the rights of the parties regardless of the inaccuracy of the measurements and the errors in distance found in the field-notes. The trial court must ascertain as near as may be where this monument was set by the government surveyor. If the exact spot cannot be found it must if possible decide from the data appearing in evidence its approximate position, and the proportional method is to be used only when no other reasonable method is possible, and it must be so used that it does not contradict or conflict with the official data that are not impeached, and which when not impeached confine the position within certain limits. The application of the proportional method must in that case be also confined to the same limits."

[2] In the case at bar the trial court was apparently satisfied that the evidence in the case afforded the means of locating the quarter corners on the west and south sides of the section without resorting to the proportional method; and a comparison of the government field-notes with the testimony

of witnesses relative to the topography of the country traversed by the government surveyor in reaching and placing these points does not enable us to say that it was not justified in locating these corners as it did without resorting to the method claimed by the appellants to be compulsory under the circumstances here presented.

The appellants make the further point that the court failed to find upon a material issue, namely, the claim by the plaintiff, denied by the defendants, of ownership of land in the south half of the southwest quarter of the same section; but as the court granted the plaintiff no relief under this claim, and the point is made by the appellants for the first time in their closing brief filed after the oral argument of the case, we do not feel called upon to give it consideration.

For the reasons stated the judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 3, 1919.

All the Justices concurred.

[Civ. No. 3101. Second Appellate District, Division One.—September 6, 1919.]

JOHN FRANKLIN WEST, Petitioner, v. BOARD OF EDUCATION OF THE PASADENA HIGH SCHOOL DISTRICT and the PASADENA CITY HIGH SCHOOL DISTRICT OF LOS ANGELES COUNTY et al., Respondents.

- [1] **MUNICIPAL CORPORATIONS—FREEHOLDERS' CHARTER—APPOINTMENT OF SUPERINTENDENT OF SCHOOLS—TERM OF OFFICE.**—Where a freeholders' charter provides under the title "Department of Education" that "in all matters not specifically provided for in this charter the board (of education) shall be governed by the provisions of the general law relative to such matters," and such charter is silent as to the term for which the superintendent of schools should be elected, its provisions only authorizing the board of

education, at its discretion to "appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent," it follows as a natural and necessary deduction that the electors in adopting such charter, and the legislature in ratifying it, intended that the duration or term of office of the superintendent of schools should be controlled by the general statute, which fixes the term at four years.

PROCEEDING in Mandamus to compel respondents to permit petitioner to exercise the duties of the office of superintendent of schools. Writ issued.

The facts are stated in the opinion of the court.

Woodruff & Shoemaker for Petitioner.

James H. Howard for Respondents.

A. J. Hill, County Counsel, *Amicus Curiae*.

JAMES, J.—Mandate to compel respondents to permit petitioner to exercise the duties of the office of superintendent of schools of the Pasadena City School District and the Pasadena City High School District, and to require respondents to draw a warrant in petitioner's favor for the sum of \$375 in payment of his salary as such superintendent for the month of July, 1919.

On the 24th of June, 1919, the board of education of the city of Pasadena held a regular meeting, there being three of the five members constituting the board present. These three members unanimously adopted a resolution or motion for the employment of petitioner to be superintendent of schools for the city of Pasadena for the term of four years, beginning July 1, 1919, at a salary of four thousand five hundred dollars per annum, payable monthly. On July 2d an adjourned meeting of said board was regularly held, the same three members being present, and it evidently being the apprehension that the action on the 24th of June was not expressed with sufficient formality in the resolution then adopted, the board adopted the following further resolution:

"Resolved, that the action of this Board on Tuesday, the 24th day of June, 1919, in declaring that the contract of employment then existing between this Board and Dr. Jeremiah M. Rhodes expired by its terms on June 30, 1919, and

in appointing John Franklin West of San Diego, Superintendent of the City Schools of the Pasadena City School District and the Pasadena City High School District, for a term of four years, beginning the first day of July, 1919, and ending on June 30, 1923, be and the same is hereby ratified and approved; and

“Be it resolved further that in event the legality of the action of this Board taken on the 24th day of June, 1919, in filling the office of Superintendency of Schools for the ensuing term, should be questioned upon any ground whatever, then this Board will and does here now at this meeting appoint the said John Franklin West as Superintendent of the Pasadena City School District and the Pasadena City High School District, for the term of four years, commencing on the first day of July, 1919, and ending on the 30th day of June, 1923, at a salary of Four Thousand Five Hundred Dollars (\$4500) per annum, payable monthly; and

“Be it further resolved that the Vice-President and Clerk of this Board be and they are hereby empowered and directed to enter into a contract of employment with the said John Franklin West in the name and on the behalf of this Board under and in pursuance of these resolutions.”

Petitioner having been notified of the action taken by the board at its meeting on the date first mentioned, under date of June 25, 1919, dispatched to the said board a telegram accepting the employment in the words following: “Accept the appointment as city superintendent of your schools, on terms and conditions stated in your telegram.” The office of superintendent of schools had theretofore been filled by Jeremiah M. Rhodes, whose term (being of four years’ duration) expired on June 30, 1919. On July 7, 1919, the incoming board of education organized, an election having changed the personnel only as to one member, that one outgoing member being one of those who had participated in the election of petitioner as superintendent. The new board, voting three to two, proceeded to adopt a resolution attempting to rescind all of the action of the preceding board in the matter of the employment of petitioner as superintendent of schools. The petition shows that petitioner has been in attendance, ready and offering to perform the duties of the office of superintendent of schools, and that the board of education has refused him that right and refused to award

to him any payment for his services under the alleged contract of employment. That the meeting of the outgoing board at which the resolution employing petitioner was adopted was regular and that the number attending and voting thereat was sufficient, is not questioned, and indeed could not be. The resolution first adopted was sufficient in form to express contractual terms, if accepted by petitioner. The employment as offered was promptly accepted and upon acceptance being made a binding contract arose, unless by reason of the law the action taken was in some particular unauthorized. We do not decide that the action taken before the expiration of the term of the superintendent attempted to be retired was premature. Even though it be conceded that there was no authority in the board to employ petitioner until his predecessor's term had actually expired, it does appear that the board, by the resolution adopted on the 2d of July, made a complete and second resolution wholly covering the same matter. Petitioner, as has been noted, thereafter appeared and tendered his services and offered to fill the position, so that it matters not, in our opinion, whether we say the employment was made under the resolution of June 24th or that of July 2d. The main argument of counsel is directed to the point as to whether in cities operating under freeholders' charters the general laws of the state are applicable and govern in all school matters; or whether the charter provisions affecting such questions govern exclusively. The fact is first pointed to that it is provided in section 1793 of the Political Code, that "City superintendents of public schools, elected by city boards of education, shall be elected for a term of four years, . . ." Assuming that the general law is applicable, this express provision having been incorporated in the code relative to the term of the superintendent of schools, petitioner contends that the board had the right to make an engagement for the four years specified. Respondents contend that the charter provisions are exclusively applicable and that those charter provisions do not authorize the board of education to make employment for such a length of time as was attempted to be done. In this connection it is urged that section 1584 of the Political Code (appropriate action having been taken thereunder) aids in defining the charter provision as being exclusive. It is shown by the agreed statement of facts that such action has been taken as

is mentioned in section 1584. That section provides that where there has been an appropriate action in the direction required, "then the electors of such school district shall be deemed to have submitted to be governed in all matters relating to the management of public schools within such school district or high school district as fully and to all intents and purposes as though the electors of such school district or high school district had by their votes elected to be governed by the provisions of such charter." The section in brief provides for the question to be submitted to the electors as to whether the charter provisions shall govern, and provides that where the electors have participated and voted at any school election held subsequent to the adoption of and under the provisions of the charter, the same effect shall follow as though the question had been specially submitted and an affirmative vote made. Petitioner contends that if the section last mentioned purports to disassociate all general statutes from connection with school affairs of a chartered city, then it is unconstitutional for the reason that the school system is a state system, and not a municipal affair, and is controlled by general laws unless there is an absence of legislation upon the subject; citing *Kennedy v. Miller*, 97 Cal. 429, [32 Pac. 558]. Also, *Mahoney v. Board of Education*, 12 Cal. App. 293, [107 Pac. 584], and other cases which generally define the school system as being a state matter and not falling within the class of "municipal affairs." [1] We are not inclined to follow counsel through the various phases of this argument because it seems to invite unnecessary labor, in that the charter provisions of the city of Pasadena relating to the school department contain nothing by which it may be said the authority of the board of education to employ a superintendent for a fixed term is prohibited. We find upon that subject, under the title of "Department of Education," article 16 of the charter, the following sections: "Sec. 6. The Board of Education may, at its discretion, appoint a Superintendent of Schools, and prescribe the duties and fix the salary of such Superintendent. Sec. 7. In all matters not specifically provided for in this Charter the board shall be governed by the provisions of the general law relative to such matters." It then appears that no attempt is made in the charter to limit the term of the superintendent of schools authorized to be elected by the board of education. Acting

under the authority alone of the charter provision, and conceding without deciding that it has exclusive effect, we would find no difficulty at all in sustaining the contract made with petitioner for four years' employment. But furthermore, the charter being silent as to the term for which the superintendent should be elected, and its provisions only authorizing the board of education "to appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent," it follows as a natural and, we think, necessary deduction that the electors in adopting the charter, and the legislature in ratifying it, intended that the duration or term of office of the superintendent of schools should be controlled by the general statute, which fixes the term at four years. Looked at from any angle that the argument assumes, we think that the contract of petitioner was made with full authority and must be upheld.

Peremptory writ is ordered to be issued as prayed for, petitioner to have his costs.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2018. Third Appellate District.—September 8, 1919.]

WILLIAM B. ROBBEN, Plaintiff and Respondent, v. MRS. I. M. BENSON et al., Defendants and Appellants; OSCAR C. SCHULZE, INC., Intervener and Respondent.

- [1] **APPEAL—LAW OF CASE—NEW TRIAL—DIFFERENT FACTS.**—The law of a case determined by an appeal does not apply to a new trial of the case in which substantially different facts are presented.
- [2] **DEEDS—MISTAKE IN NAME OF GRANTEE—REMEDY TO CORRECT.**—Where a mistake has occurred in the name of a grantee in a deed which is essential to a title and which appears both in the deed and the record thereof, a suit to quiet title against the claims of grantee named is essential to the perfecting of the record title; but where the deed contains no mistake, the only mistake being in the recording of it, the owner cannot in good faith swear that there is an outstanding claim and the necessity for maintaining such an action disappears.
- [3] **APPEAL—LAW OF CASE—SUFFICIENCY OF ABSTRACT OF TITLE—SUBSEQUENT TRIAL—ADMISSION OF NEW FACTS.**—In an action involv-

ing the sufficiency of the record title to certain property as shown by the abstract furnished, the opinion of the district court of appeal, declaring the necessity for the bringing of an action to quiet title in the vendor as against the grantee named in a certain deed as recorded to establish of record that the conveyance was made to such vendor's predecessor instead of the grantee named, will not prevent such vendor on a subsequent trial from showing by evidence, which was not before the district court of appeal, that the deed in question was not important.

- [4] **ID.—FINDING NOT QUESTIONED—TAKEN AS TRUE.**—Where the sufficiency of the evidence to sustain a finding of the trial court is not questioned in any way the finding is to be taken as true on appeal.
- [5] **ID.—DUTY OF APPELLANT—OBJECTIONS CONSIDERED.**—It is the duty of the appellant to point out the evidence or the lack of evidence showing a finding assailed is unsupported. The court on appeal will look only to the objections argued.
- [6] **NAMES—IDEM SONANS—REBUTTAL OF PRIMA FACIE CASE.**—Names which have the same pronunciation do *prima facie* designate the same persons, but the *prima facie* case so shown is liable to be much shaken by the slightest proof of facts which produce a doubt of identity.
- [7] **ID.—ADMISSIBILITY OF PAROL EVIDENCE.**—Where the case permits parol evidence, such testimony may show two names to be within the rule although there is considerable difference in spelling.
- [8] **ID.—SIMILARITY OF SOUND—PROVINCE OF COURT AND JURY.**—If two names spelled differently, necessarily sound alike, the court may as a matter of law pronounce them to be *idem sonans*; but if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury.
- [9] **ID.—ADDITION OF LETTER "S."**—Generally, the addition of a letter "s" to one of the two names considered takes them without the rule of *idem sonans*.
- [10] **ID.—RELEVANCY OF FACTS IN REGARD TO TITLE.**—The facts in regard to the title of property as shown by the records would be quite as conclusive as an aid in determining the question of identity as would be the clearest kind of parol testimony introduced in those cases where the court is in doubt as to whether two names which are very similar, though somewhat differently spelled, have substantially the same pronunciation and designate the same person.

6. *Idem sonans*, note, 100 Am. St. Rep. 322.

9. Addition or omission of final "s" as affecting application of doctrine of *idem sonans*, notes, Ann. Cas. 1918A, 351; 52 L. R. A. (N. S.) 937.

- [11] **ID.—EFFECT OF INSTRUMENT OF RECORD—ABSENCE OF ADVERSE CLAIMS.**—In judging whether a title is affected by an instrument of record purporting to show an interest outstanding in another it is permissible to show that no claim has ever been asserted by such other person.
- [12] **ID.—CASE AT BAR—SIMILARITY OF NAMES—SAME INDIVIDUAL—FINDING.**—In this action, although the two names, "B. W. Robbins," and "B. W. Robben," were not strictly within the rule of *idem sonans*, considering the great resemblance between them, the fact that they both appear in connection with the same title, and that during a period of thirty-eight years there had been no adverse claim to the property, the record would leave no reasonable doubt in regard to the title, and a finding that the two names represented different persons would not be sustained.
- [13] **QUIETING TITLE—INTERVENTION BY LIEN CLAIMANT.**—In an action to quiet title, a person claiming a judgment lien on the property may be permitted to intervene.

APPEAL from a judgment of the Superior Court of Solano County. W. T. O'Donnell, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. L. Shinn and A. L. Hart for Appellants.

W. U. Goodman for Plaintiff and Respondent.

F. F. Marshall for Intervener and Respondent.

W. A. ANDERSON, J., *pro tem.*—This is in form an action to quiet title brought by the vendor against the vendees upon an alleged forfeiture by the vendees under a contract for the sale of real property, and the main point urged by appellants for a reversal of the judgment is that the law of the case has been violated. It is also urged that intervention should have been denied.

The complaint contains two counts. The first count is in the usual form employed in an action to quiet title. The second count alleges that on December 6, 1911, the plaintiff, William B. Robben, made an agreement with the defendants, Mrs. I. M. Benson, Alt. G. Smith and E. W. Benson, whereby plaintiff agreed to sell to the defendants the northwest quarter of section 30, township 7 north, range 2 east, Mount Diablo base and meridian, for twenty-one thousand

six hundred dollars, payable in installments. The contract is set out in the complaint.

The plaintiff agreed to furnish an abstract. The contract stated: "Second parties are to be given 15 days in which to examine said abstract and report upon the same; in the event title to said premises shall be found to be defective, the said first party is to be given a reasonable time in which to perfect the same." The contract did not in terms provide that time should be the essence thereof; it declared the vendees' rights would be forfeited for failure to comply with its terms. It gave the vendees immediate possession. It is further alleged in the second count of the complaint that on December 6, 1914, there was due on the contract \$4,176 and that this sum has not been paid, and that under the terms of the contract the rights of the vendees have become forfeited.

Defendants' answer first denies all the material averments of the first count of the complaint. It is admitted defendants claimed an interest in the property. In their answer to the second count of the complaint the defendants deny that on December 6, 1911, any sum became due under the contract. They admit that they paid nothing on that date, but they deny that any sum was due. The defendants filed a cross-complaint in which they set up the contract, and allege they had entered into the possession of the land; that they had fully performed all of the conditions of the contract; that up to December 1, 1914, the plaintiff had failed to furnish a complete or any abstract of title to the land, although the same was demanded on that date; that on or about December 18, 1914, the plaintiff furnished an abstract which was defective and which was objected to on the grounds that it showed the record title to the property was vested in one B. W. Robbins, and that the United States patent to the lands failed to specify any township or range, and that there was a like omission in a certain deed from William T. Smith to W. D. Vail; that after the objections were made to the abstract plaintiff refused to make correction of the deed from Smith to Vail or to obtain a conveyance from B. W. Robbins or to quiet his title; that after the first examination of the abstract by defendants and their noting of their objections thereto and their return of the abstract to the plaintiff for correction of the title, the plaintiff again returned it to the defendants, and from a re-examination of said abstract by

defendants it was ascertained that the abstract had been falsified so that it was made to appear that no conveyance to B. W. Robbins had ever been recorded, that the abstract failed to show record title to the land; that complaint was made, but that plaintiff refused to furnish any other or additional abstract. The cross-complaint alleged the amounts paid on the purchase price of the land and the amounts expended on the property during defendants' possession; it alleged possession of the property had been surrendered, and prayed for a recovery of the moneys paid and expended.

The answer to the cross-complaint denied that there was any failure to furnish a complete abstract of the title, or that the title was defective, or that there was any refusal to procure a decree quieting title, and alleged that it clearly appeared from the abstract that Robbins had no interest in the land. Plaintiff denied that the abstract was falsified or that the defendants refused to accept it, or that plaintiff had refused to do anything further with respect to the title.

At the trial it was conceded that the defect in the patenting of the lands had been remedied, and the defendants asserted that the defect upon which they relied was the record of the deed from Vail to Robbins and what had transpired in regard thereto.

The case has been twice tried. On each trial plaintiff prevailed. The first judgment was reversed (37 Cal. App. 227, [173 Pac. 766]). The judgment entered on the second trial, like that entered on the first trial, provided that if the defendants did not pay the amounts due under the contract within a time specified, their rights in the property would be forfeited.

The point relied on for a reversal is that the former opinion is the law of the case. In this contention appellants overlook the difference between the record of the case as first presented and as now presented. The bill of exceptions used on the first appeal did not contain all of the evidence offered on the first trial; it did not contain the abstracts offered in evidence; it contained a recital in regard to the abstracts which narrowed the court's consideration of the case to a particular point.

[1] The law of a case determined by an appeal does not apply to a new trial of the case in which substantially different facts are presented. (*Ellis v. Witmer*, 148 Cal. 531, [83

Pac. 800]; *Stockton etc. Works v. Glens etc. 1. Co.*, 121 Cal. 174, [53 Pac. 565]; *Duckworth v. Watsonville Water etc. Co.*, 170 Cal. 433, [150 Pac. 58].) The difference in facts here is not so much a difference between the evidence received on the first and that received on the second trial, as it is a difference between the evidence offered at the first trial and the record of the same presented to the court on the first appeal.

The former opinion of the district court of appeal recites that in order to show complete title it became necessary for the plaintiff to show a conveyance from one W. D. Vail to B. W. Robben; that the abstract showed a conveyance made on November 8, 1876, from W. D. Vail to B. W. Robbins; that this instrument was recorded on November 10, 1876; that after the abstract was returned to the plaintiff the attorney for the plaintiff, together with the abstracter, went to the office of the county recorder of Solano County, and, on December 14, 1914, the recorder changed the record so that the word "Robbins" was made to read "Robben"; that thereupon the abstract was changed so that it appeared a deed had been made by the said Vail to the said Robben and that such deed had been recorded; that the defendants had examined the record showing the change and had objected to the title, and that plaintiff had refused to do anything further in the way of furnishing an abstract.

The evidence on the second trial shows that the record of the first recording of the deed was changed as stated, lines being drawn through the name "Robbins," and the word "Robben" being written above; the initials of the recorder and his deputy were written in the margin of the record. The original deed was produced when the change was made. The testimony shows the parties making the change thought the course pursued was proper. The character of the change is evident from the record, a photographic copy of which is set out in the reporter's transcript. As hereinafter shown, the original deed was later re-recorded.

It is conceded in the briefs that the record on the former appeal contained the statement next quoted, with respect to the abstract or abstracts furnished to defendants by the plaintiff:

"The entire abstract was filed in evidence, marked 'Plaintiff's Exhibit B,' and as filed showed perfect record title in

the plaintiff. One of the essential muniments of title appearing in said abstract was a deed purporting to have been executed by W. D. Vail to B. W. Robben, dated Nov. 8, 1876, and recorded Nov. 10, 1876, in Book 63 of Deeds, page 117. The said deed as appearing in said abstract did not show anything with reference to any change or correction of the record of the same in Book 63 of Deeds, page 117, since the date of its said recordation."

On the last trial the court made a finding as to the record title of plaintiff, which is to the effect that the record of the deed to B. W. Robbins was not a part of the chain of title to plaintiff's lands. This finding is based upon evidence which was not before the district court of appeal, except to the extent shown by the quotation last set forth.

In the former opinion it was also stated that, after complaint was made as to the change in the record of the deed to B. W. Robbins, "The plaintiff refused to have anything more to do with the abstract, but it does appear that on or about the 15th of January, 1915, a conveyance from Vail to Robben was taken to the recorder's office and recorded. However, the existence of this conveyance and of the fact of its being placed of record was not called to the attention of the defendants, nor does it appear that any supplemental abstract was furnished by the plaintiff to the defendants showing the devolution of title from Vail to Robben. The matter appears to have remained *in statu quo* until about April 5, 1915, when the plaintiff began this action to quiet title to the premises involved." This statement was in accordance with the record of the case as presented to the court. On the second trial the exact facts were shown with respect to furnishing supplementary abstracts, and on this appeal these facts and these abstracts are brought up, and the record is not curtailed by the brief recital set forth in the record of the former appeal. (The entire record relating to the evidence on the former appeal contained 25 pages, and on this appeal it numbers 312 pages.)

In regard to the showing as to title, the former opinion points out that on the trial of the case and for the purpose of showing title to the property, the plaintiff introduced in evidence the original deed from W. D. Vail to B. W. Robben, dated November 8, 1876, and recorded November 10, 1876,

and re-recorded January 15, 1915. The court, in the former opinion, declares:

"There does not appear to be any testimony showing that the existence of this deed was called to the attention of appellants until its introduction in evidence."

The testimony of F. F. Marshall, who was acting as the attorney for plaintiff, was offered on the second trial. It showed the furnishing to defendants of a supplementary abstract showing the re-recording of this deed.

This court, in its former opinion, recognized the rule that defendants were entitled to a title fairly deducible of record as well as good title in fact; it held that the county recorder was not authorized to make the change in the record. The court further declared: "The re-recording of the deed from Vail to Robben on January 15, 1915, and exhibit thereof to the defendants, would have laid a foundation for maintaining an action wherein, all proper parties defendant having been joined, judgment might have been entered by the trial court, finding plaintiff's title valid, quieting any claims of B. W. Robbins to said premises, establishing of record that the conveyance purporting to be made to Robbins was in fact made to Robben, and decreeing performance by the appellants within a reasonable time or suffer the alternative of a forfeiture." The court then pointed out that the plaintiff had not elected to pursue the course suggested, but had, in effect, elected to treat the contract as ended by bringing suit to quiet title. The court ruled that defendants, having surrendered possession, were entitled to a return of the money they had paid out; that the defendants' motion for a nonsuit should have been granted; that the trial court should have proceeded to determine the amount the defendants were entitled to recover.

It distinctly appeared on the second trial of the case that this original deed bore indorsements of the county recorder made in conformity with sections 4137 and 4138 (formerly sections 4241 and 4242) of the Political Code, showing that it was the deed which had been recorded on November 10, 1876, in book 63 of deeds, page 117. The indorsements of the county recorder, made upon this original deed, specified the time of recordation and the place thereof, and these indorsements are shown in the supplementary abstracts covering the second recording of the instrument. On the second trial

of the case it was shown that this abstract was furnished to defendants, and it also appeared that the evidence before the trial court on the first trial of the case showed the same thing. Defendants on receiving the abstract showing the foregoing facts never called for the production of the original deed. They made general objection that title had not been shown. The original deed was introduced as an exhibit on the trial of the case, and the grantee is therein named W. B. Robben.

It is true that in the first opinion of this court it was, in effect, declared that there should have been not only re-recording of the deed from Vail to Robben and the exhibit thereof to the defendants, but that there should also have been a suit to quiet title against the claims of Robbins. [2] While authorities were not cited in support of the position that such an action was necessary, there are authorities to the effect that where a mistake has occurred in the name of a grantee in a deed which is essential to a title and which appears, both in the deed and in the record thereof, an action of the kind suggested by this court is essential. (*Walters v. Mitchell*, 6 Cal. App. 410, [92 Pac. 315].) The case last cited suggests that a suit *in rem* will reach such an outstanding claim. But where the plaintiff, as here, has found the original deed, and it is obvious to him that the deed contains no mistake, but that the mistake is in the first recording of it, he could not in good faith swear there was an outstanding claim. But the necessity for maintaining such an action as that referred to disappears, in view of the finding of the trial court, based on evidence offered on the second trial of the case. Finding VIII, made by the trial court on the second trial of the case, is as follows:

"That the complete chain of title of record in said property vested in plaintiff is as follows:

"U. S. Patent to William T. Smith;

"Deed from William T. Smith and Mary Smith, his wife, to W. D. Vail;

"Deed from W. D. Vail to Bank of Dixon;

"Deed from Bank of Dixon to W. B. Robben;

"The Court finds that B. W. Robbins never had any title to said land, record or otherwise.

"The Court finds that at one time subsequent to conveying said land to Bank of Dixon, W. D. Vail made and executed

a deed conveying said land to B. W. Robben; said deed was incorrectly recorded by the County Recorder copying said name Robben as Robbins; said deed from Vail to Robben was subsequently correctly recorded in the office of the County Recorder of Solano County and the re-recording of said deed set forth in said abstract which was furnished to defendants on or about the 4th day of March, 1915; that plaintiff through mesne conveyances, all of which appear of record and are set forth in said abstract, obtained whatever title the said B. W. Robben might have had to said land."

The foregoing finding evidently proceeds on the theory that Vail deeded to the bank before the recording of the so-called deed to Robbins, that the bank continued to hold title, and later, and during the time defendants were objecting to the record of the title, proceeded to convey the title to the plaintiff herein. The original abstract showed the deed to the bank, and a supplementary abstract showed the deed from the bank to the plaintiff herein. The evidence showed these abstracts were furnished to defendants. It further appears that neither of these deeds constituted any part of the evidence as supplied to the district court of appeal on the first hearing. The present appeal is upon a reporter's transcript, which contains all the abstracts furnished defendants.

Appellants refer neither to testimony nor to the absence of testimony for the purpose of showing that the foregoing finding is not supported by the evidence. [3] Their sole point is that what the district court of appeal said in its opinion on the former trial in regard to the importance of the record of the so-called deed to Robbins and the remedy to be pursued to clear the record of a possible claim under that deed was binding on the trial court. Certainly the former opinion did not preclude respondent from showing by evidence, which was not before the district court of appeal, that the so-called deed to Robbins was not important. [4] As stated, the sufficiency of the evidence to sustain the finding of the trial court, hereinbefore quoted, is not questioned in any way, and this being so, the finding is to be taken as true on appeal. (*Brovelli v. Bianchi*, 136 Cal. 612, [69 Pac. 416]; *Kyle v. Craig*, 125 Cal. 116, [57 Pac. 791]; *Tait v. McInnes*, 3 Cal. App. 156, [84 Pac. 674].) [5] These cases establish that it is the duty of the appellant to point out the evidence or the lack of evidence showing a finding assailed is unsup-

ported, and that the court on appeal will look only to the objections argued. This finding referred to evidently depends upon evidence consisting of pages of the abstracts which were no part of the record on the first appeal, and this being true, and the finding being unassailed, it is determinative of the case.

In view of the evidence offered at the second trial we would be compelled to hold that if finding VIII of the trial court could be disregarded and plaintiff were compelled to rely upon the record of a deed to Robbins, his title would be good and fairly deducible of record. It is true that the former opinion of the court conclusively determines that "B. W. Robbins" and "B. W. Robben," are not within the rule of *idem sonans*. [6] Names which have the same pronunciation do *prima facie* designate the same persons. "But this *prima facie* case so shown is liable to be much shaken by the very slightest proof of facts which produce a doubt of identity. A well-known writer seems to state the rule on this point very acceptably and clearly: 'The probative force of the inference of identity from similarity of names is greatly diminished in force, even to the vanishing point, by introducing into the consideration of the matter facts inconsistent with the truth of the administrative assumption that similar names identify a single individual.' 2 Chamberlayne, Mod. Law of Ev. 1191." (*Keyes v. Munroe*, 266 Mo. 114, [180 S. W. 863].) The following is a further explanation of the rule: "In the case of *Johnson v. State*, 65 Fla. 492, [62 South. 655], Mr. Justice Taylor, who delivered the opinion of the court, said: 'Where two names are presented to the consideration of the court, the inference that they designate the same individual is strong in proportion as the difference between the two are slight; and conversely, the inference of identity is weak as the points of difference between the two names are numerous and marked.' " (*Rhodes v. State*, 74 Fla. 230, [76 South. 776].) [7] Where the case permits parol evidence, such testimony may show two names to be within the rule although there is a considerable difference in spelling. (*People v. Fick*, 89 Cal. 149, [26 Pac. 759].) The part which parol evidence may play in establishing identity of pronunciation and hence identity of persons is further explained in the case next quoted from. In *Commonwealth v. Warren*, 143 Mass. 568, [10 N. E. 178, it was said: "The

province of the court and jury in cases like the present is governed by the following rule: [8] 'If two names spelled differently, necessarily sound alike, the court may as matter of law pronounce them to be *idem sonans*; but, if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury.''' In *Munkers v. State*, 87 Ala. 96, [6 South. 358], Clopton, J., said: "Though this is strictly a question of pronunciation when raised by demurrer, it may be treated as a question of law; but in such case the judgment of the court should express the conclusion of law from facts or rules of which judicial notice may be taken. When there is no generally received English pronunciation of the names as one and the same, and the difference in sound is not so slight as to be scarcely perceptible, the doctrine of *idem sonans* cannot be applied without the aid of extrinsic evidence, unless when sound and power are given to the letters as required by the principles of pronunciation, the names may have the same enunciation or sound." (*Veal v. State*, 116 Ga. 589, [42 S. E. 705].) The court proceeded to specify names that, as matter of law, had been held within the rule, as follows: "Blankenship" and "Blackership," "Owens D. Havely" and "Owen D. Haverly," "Hudson" and "Hutson," "Jeffers" and "Jeffries." It held that "Witt" and "Wid" were the same as matter of law. The names "Pomp Burton" and "Pomp Burden" are within the rule. (*Burton v. State*, 10 Ala. App. 214, [65 South. 91].) Also "Robert" and "Roberts." (*Willis v. United States*, 6 Ind. Ter. 424, [98 S. W. 147].) [9] Generally, however, the addition of a letter "s" to one of the two names considered takes them without the rule. (29 Cyc. 276.) The footnotes at page 274 show cases in which the use of the letter is not controlling. Among the cases is cited *Seaver v. Fitzgerald*, 23 Cal. 85, in which the names "Seaver" and "Seavers" were declared to be substantially the same. The case is cited in *Brum v. Ivins*, 154 Cal. 17, [129 Am. St. Rep. 137, 96 Pac. 876]. If, in the days when neither deeds nor the records thereof were typewritten, a deed had been made to D. C. Seaver and recorded as a deed to D. C. Seavers, and the transaction had stood unassailed for forty years, D. C. Seaver and his successors dealing with the property, and D. C. Seavers and his successors not appearing at all in the record of title for a period of forty

years, we think that although it could be held that such names are slightly without the rule of *idem sonans*, the record facts in regard to the title, coupled with the great similarity in names, would leave no substantial uncertainty as to the identity of the persons designated by the different names. [10] The facts in regard to the title as shown by the records would be quite as conclusive as an aid in determining the question of identity as would be the clearest kind of parol testimony introduced in those cases where the court is in doubt as to whether two names which are very similar, though somewhat differently spelled, have substantially the same pronunciation and designate the same person.

An examination of the abstract of title shows that the deed in question was made November 8, 1876. The consideration recited was seventeen thousand dollars. The property was evidently of considerable value. The records show that after November 8, 1876, no person by the name of B. W. Robbins ever dealt with the lands, that B. W. Robben did deal with the lands, that no suit to quiet title against him was filed, that the estate of his successor in interest, Dorothea Robben, was duly administered upon in Solano County and that the property in question was appraised and accounted for as a part of the estate of Dorothea Robben, and was distributed to the heirs of Dorothea Robben, who, in turn, granted to the present plaintiff, W. B. Robben. The identity in sound between Robben and Robbin appears from the abstract. Crop mortgages made by one of the Robben heirs are signed "F. W. Robben," the body of the instruments and certificates of acknowledgment showing "F. W. Robbin." No claim is asserted of record by B. W. Robbins at any time, nor is any claim asserted of record by any one purporting to be his successor. During the long period of thirty-eight years, no one by the name of W. B. Robbins, and no one appearing to claim through W. B. Robbins, has exercised any act of ownership over the property. The silence of the record in this respect speaks as loudly as any words. [11] In judging whether a title is affected by an instrument of record purporting to show an interest outstanding in another it is permissible to show that no claim has ever been asserted by such other person. This was held in a case in which it was contended that an ancient bond for a deed showed a cloud

on title. (*Read v. Sefton*, 11 Cal. App. 88, [103 Pac. 1095].) [12] In this case such evidence bears directly on the point considered. The initials of the two names are the same; the first syllable of the two names is the same, and all that holds them apart is the letter "s," a letter not always preventing the application of the rule of *idem sonans* as matter of law. The two names appear in connection with the same title. Considering the transactions with regard to the title in question, as shown by the record and covering a period of thirty-eight years, and considering the great resemblance between the two names, B. W. Robbins and B. W. Robben, there would be no substantial reason for saying the two names represented different persons, even though the two names did not fall strictly within the rule of *idem sonans*. The entire record would leave no reasonable doubt in regard to the title, and a finding on any other theory would not be sustained.

[13] The trial court permitted Oscar C. Schulze, Inc., a corporation, to intervene. The company filed a complaint in intervention against the various defendants, setting up a claim to the interest of defendants in the property based upon judgment liens alleged to have been obtained in various actions heretofore prosecuted. The appellants cite the case of *Isaacs v. Jones*, 121 Cal. 257, [53 Pac. 793, 1101], as determining the intervention was improper. The case is not in point. A person claiming a judgment lien on real property comes within section 738 of the Code of Civil Procedure. Such a person may sue to remove a cloud on the title to the property (32 Cyc. 1334).

It follows, therefore, that the judgment of the trial court should be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 3059. Second Appellate District, Division One.—September 8, 1919.]

KATE HEGEL, Respondent, v. GRACE B. HANNAS et al.,
Appellants.

- [1] **RESCISSION — CONSTRUCTION OF CODE SECTIONS.**—Sections 1691, 3407, and 3408 of the Civil Code, which relate to the rescission of contracts, must be construed together. They are not mere statutory law, but are declaratory of well-understood principles of equity.
- [2] **ID.—RETURN OF PARTIES TO STATU QUO—EQUITY.**—It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in *statu quo*. If equity can still be done between the parties, courts will grant relief to the defrauded party.
- [3] **ID.—EXCHANGE OF REAL PROPERTIES — KNOWLEDGE OF FRAUD — MAKING OF CROPPING AGREEMENT—ACTION TO RESCIND—DECREE.**—Where one party to an exchange of real properties enters into a short-term cropping contract covering the land received by her prior to knowledge that the representations made to her were untrue, in a subsequent action to rescind the contract of exchange, provisions in the decree that the property conveyed by the plaintiff to the defendants be reconveyed to the plaintiff, that upon that conveyance the plaintiff deliver to the defendants a reconveyance of the property conveyed by the defendants to the plaintiff, and that the plaintiff also deliver to the defendants an assignment in writing conveying to the defendants all her rights and interest in and under the cropping agreement and also to all crops raised on said land under said agreement, are sufficient to restore the defendants to substantially the same position in which they would have been if the rescinded conveyances had not been made.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a motion to vacate said judgment and enter a different judgment. Frank G. Finlayson, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. T. Quinn for Appellant.

Charles J. Kelly and D. A. Stuart for Respondent.

2. Duty to place other party in *statu quo* on rescission of contract, note, 30 L. B. A. 44.

CONREY, P. J.—The defendants appeal from the judgment and from an order denying their motion for an order vacating the judgment and for an order to amend and correct the conclusions of law and to enter a judgment for the defendants instead of the judgment rendered in favor of the plaintiff.

Both appeals raise the same question. The action was brought to rescind an exchange of real property between the plaintiff and the defendants. Upon evidence the sufficiency of which is not disputed, the court found that the transaction was tainted by fraud on the part of the defendants and that the plaintiff is entitled to rescind. Finding XI reads as follows: "That after the plaintiff obtained possession of the land described in exhibit C and before she knew that the representations made to her by said Heber, which are hereinbefore found to be untrue, were in fact untrue, she made a cropping contract of said land for cropping purposes for the period of one year from the eleventh day of January, 1918, to and with one Manuel Dueso, and by the terms of this cropping contract said Manuel Dueso has the right to go upon said land for the purpose of raising crops thereon until January 11, 1919, that under the terms of said cropping contract said Manuel Dueso has raised a crop of barley hay, and has now growing on said land a crop of beans; that one of the conditions of said cropping contract is that the plaintiff is to receive one-fourth of each of these crops, but has not yet received any part of either of them, but one-fourth of said hay crop is on said land ready for delivery by said Manuel Dueso. That said land has no buildings or improvements thereon, and is only adapted to agricultural purposes, such as provided for in said cropping contract; that said cropping contract was an ordinary and proper use thereof; that otherwise than as provided by said cropping contract the plaintiff is able to surrender full possession of said land to the defendants; that the defendants are entitled to the one-fourth part of said crops that would have gone to the plaintiff under said cropping contract; that the making of said cropping contract, and the keeping of the land in cultivation thereunder, was beneficial to said land, otherwise it would be in an uncultivated condition and weeds would have grown thereon and reduced the value of said land; said cropping

contract has increased the value of said land, and, therefore, the defendants are not entitled to any other compensation on account of the right outstanding in said Manuel Dueso to go upon and use said land up to January 11th, 1919, than said one-fourth of said crop." The court ordered that the property conveyed by the plaintiff to the defendants be reconveyed to the plaintiff. It ordered that upon that reconveyance the plaintiff deliver to the defendants a reconveyance of the property conveyed by the defendants to the plaintiff, and that the plaintiff also deliver to the defendants an assignment in writing conveying to the defendants all her rights and interest in and under the Dueso lease, and also to all crops raised on said land under said lease.

[1] Section 1691 of the Civil Code provides that the party rescinding a transaction "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Sections 3407 and 3408 of the Civil Code are as follows: "§ 3407. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made." "§ 3408. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

Appellants contend for a strict application of the foregoing provisions of section 1691, and claim that the subsequent provisions above quoted cannot be applied until it is first shown that the plaintiff has fully and absolutely complied with section 1691. We do not agree with this contention. The three sections must be construed together. They are not mere statutory law, but are declaratory of well-understood principles of equity. [2] "It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in *statu quo*. If equity can still be done between the parties, courts will grant relief to the defrauded party." (*Green v. Duvergey*, 146 Cal. 379, 389, [80 Pac. 234, 238].) [3] It is our opinion that the provisions as made in the decree in this case are sufficient to restore the defendants to substan-

tially the same position in which they would have been if the rescinded conveyances had not been made. The Dueso lease was made for such a short time and upon such terms that the existence of such lease does not prevent the plaintiff and the court acting in this matter from doing substantial justice to the defendants, while at the same time the plaintiff's undoubted right to a rescission is enforced.

The judgment and order are affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 6, 1919.

All the Justices concurred.

[Civ. No. 2993. Second Appellate District, Division One.—September 8, 1919.]

E. M. BARBER, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY et al., Respondents.

- [1] **EQUITY — JURISDICTION — ADJUSTMENT OF ALL RIGHTS.**—Where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation.
- [2] **ESTATES OF DECEASED PERSONS — OBTAINING OF FINAL DECREE THROUGH FRAUD — EXPIRATION OF TIME FOR RELIEF IN PROBATE COURT — EQUITY.**—Where the decree settling a final account and distributing the estate of a deceased person has been fraudulently obtained but no opportunity remains by appeal or motion to obtain relief therefrom, the powers of a court of equity are at once available.
- [3] **ID.—ACCOUNTING — JURISDICTION OF EQUITY COURT.**—Where an action is brought in equity to set aside a decree settling a final

1. Rule that equity assuming jurisdiction for one purpose will retain it for all purposes, note, *Ann. Cas.* 1912A, 803; exceptions to rule, note, 116 *Am. St. Rep.* 877.

account and distributing the estate of a deceased person on the ground that it was obtained through fraud, it being alleged that the final account of the administrator was false and fraudulent, and that he failed to account for a large amount of the assets of the estate, and falsely credited himself with sundry sums for which in fact he was not entitled to receive credit, and an accounting is prayed, such accounting may be made in the equity court; and the payment of the money found to be due into the hands of the new representative of the estate by the defaulting representative will constitute a protection against all claimants.

- [4] **ID.—ACTION AGAINST FORMER ADMINISTRATOR — PARTIES.**—Under appropriate circumstances, an administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain a suit for an accounting against a former administrator; and in such an action, the administrator is the only necessary party plaintiff.

PROCEEDING in prohibition to prevent the setting aside of a decree settling a final account and distributing the estate. Writ denied.

The facts are stated in the opinion of the court.

Thomas, Beedy & Lanagan and Patterson Sprigg for Petitioner.

Bischoff & Thompson for Respondents.

CONREY, P. J.—The petitioner applied for a writ of prohibition commanding respondents to refrain from certain threatened proceedings in an action numbered 26,366 and entitled *Ostergard, Administratrix, et al. v. E. M. Barber and United States Fidelity and Guaranty Company*. An alternative writ was issued. Respondents' return is in the form of a demurrer, which rests upon the ground that the facts alleged are not sufficient to entitle petitioner to the demanded relief.

Barber was administrator of the estate of James Ostergard, deceased. His final account and petition for settlement and distribution of that estate were filed on the tenth day of September, 1914, in the superior court of San Diego County. On the twenty-ninth day of that month the account

4. Action by administrator against predecessor for accounting, note, 108 *Am. St. Rep.* 428.

was approved by order of court, and a decree of final distribution followed in due course. On the sixth day of July, 1916, the letters of administration of Barber were revoked. On the eighth day of July, 1916, Ingina Ostergard was appointed administratrix of said estate.

Thereafter, Ingina Ostergard, as administratrix, together with Victoria Jensen, Mary Larsen, and Ingina Ostergard, claiming to be the only heirs at law of James Ostergard, deceased, and claiming to be the only persons interested in his estate, commenced said action No. 26,366. In that action facts were alleged showing that said final account of Barber as administrator was false and fraudulent, and that in fact he failed to account for a large amount of the assets of the estate, and falsely credited himself with sundry sums for which in fact he was not entitled to receive credit; that the time within which an appeal might have been taken or any application for relief made, as against said order and decree in the probate proceeding, had expired before the alleged fraudulent acts of Barber were discovered by the plaintiffs. Plaintiffs demanded that said order and decree be vacated; that a true account be made, and prayed for such other and further relief as is agreeable to equity.

The petition herein shows that on the twenty-second day of March, 1919, in said action No. 26,366, findings of fact were entered, and conclusions of law thereon which were in favor of the plaintiffs; that the court proposes not only to set aside said order and decree in the probate proceeding, but also has made an order fixing a certain date for an accounting to be made by said Barber, before the court in said action No. 26,366.

By his petition herein said E. M. Barber seeks to prevent respondent from proceeding with such proposed accounting, in that action. His contention is that the settlement of such an account is within the exclusive jurisdiction of the superior court as a probate court, exercisable solely by a proceeding in the matter of the estate of James Ostergard, deceased, and that, therefore, the court in the equity case having set aside the order and decree formerly made, its sole further jurisdiction will be limited to the power to decree that a further accounting be made in the probate proceeding. This contention presents the only question now before us.

[1] 1. It is an established rule that "where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation." (*Swan v. Talbot*, 152 Cal. 142, [17 L. R. A. (N. S.) 1066, 94 Pac. 238].)

[2] 2. Let it be assumed that until the decree settling the final account of Barber as administrator and distributing the estate had been made, and until that decree had become final by expiration of the time within which an appeal therefrom might have been taken, the court in probate had exclusive jurisdiction over all matters of accounting by the administrator. But when that time had expired, and no opportunity remained by appeal or motion to obtain any relief against such decree, the powers of a court of equity were at once available if the decree had been fraudulently obtained; and those powers became active instead of latent, for the very reason that then the ordinary course of procedure within the limits of probate jurisdiction could not be used to afford the demanded relief. At the time when action No. 26,366 was instituted the court acquired jurisdiction over the subject matter thereof. Unless there is some peculiar limitation in the nature of the case, whereby the usual chancery powers are curtailed, we are certain that an accounting may be made in that action, and a decree entered granting complete relief between the parties before the court.

[3] 3. Petitioner contends that there is a reason why the accounting must be had in the probate court, in this, that the proposed decree will necessarily reopen the administration of the estate, by setting aside the decree of settlement of account and final distribution; that a new decree, based upon a new report, notice, and hearing, will be required in that proceeding; that, perchance, additional claimants to some interest in the estate will be unearthed; that such additional claimants being not before the court in the action in which it is now proposed to take an accounting, Mr. Barber will thus be exposed to two several attacks upon his administration where only one should be required. Counsel for petitioner say: "If the present case proceeds to a judgment, Mr. Barber will

have to pay to the plaintiffs the amount found due from him on an accounting. This will not protect him, because the probate court has not determined to whom the estate of James Ostergard is to go." This contention is not sound. Barber can satisfy any decree entered against him by paying the required sum into the hands of the administratrix, who is a plaintiff in the action, and as such administratrix will be responsible for the money so received. The court in its findings has declared, presumably upon sufficient evidence, that the plaintiffs are the only heirs at law, persons, and parties interested in the estate. With all his years of acquaintance with this estate and its affairs, petitioner does not anywhere suggest a claim that this finding is untrue. He rests upon the bare possibility that some new claimant might appear when the administration of the estate is about to be closed; and so raises this cloud, less substantial than ether, as a wall to limit the jurisdiction of a court of equity. [4] If there be some remaining unknown claimant, he has been represented by the administratrix as plaintiff in action No. 26,366. If section 369 of the Code of Civil Procedure applies to such an action—and we think that it does—she was the only necessary plaintiff in that action. "An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate." (Code Civ. Proc., sec. 1586.) There appears to be no good reason why the administrator may not, with like effect, under appropriate circumstances, maintain a suit for an accounting against a former administrator.

For the foregoing reasons an order has been entered denying the application for a peremptory writ and directing that this proceeding be dismissed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 6, 1919.

All the Justices concurred.

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[Civ. No. 2991. Second Appellate District, Division One.—September 8, 1919.]

CHARLES A. CHASE, Respondent, v. **HOMER H. PETERS, Jr., et al.**, Defendants; **PETERS INVESTMENT COMPANY** (a Corporation), et al., Appellants.

- [1] **UNLAWFUL DETAINER — JUDGMENT — RETENTION OF POSSESSION — TIME TO MAKE TENDER OF RENT DUE — APPEAL.**—Under section 1174 of the Code of Civil Procedure, tender of the amount of rent found to be due should be made within five days after entry of judgment in an action in unlawful detainer, where retention of possession is desired; and the time for making such tender is not extended by the taking of an appeal from such judgment, notwithstanding the judgment is modified by striking therefrom the amount found to be due the plaintiff for taxes, which plaintiff sued for in a separate count, no order of reversal being made as to the remainder of the judgment.

APPEAL from a judgment of the Superior Court of San Diego County. **W. A. Sloane**, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Riley & Heskett and **Wright & McKee** for Appellants.

James E. Wadham, **James S. Bennett** and **Frank J. Macomber** for Respondent.

JAMES, J.—This is an appeal taken by the Peters Investment Company, a corporation, and certain other persons named, who are designated as trustees of said corporation. The appeal is from an order of the superior court refusing an application for an order to restore the Peters Investment Company to the possession of certain real property from which it had been ousted by process authorized under a judgment for unlawful detainer. For convenience, we will designate the appellant in this case under the general name of Investment Company.

Prior to May, 1917, the Investment Company held possession of the real property in question under an assignment made by the lessee of the plaintiff. Default had been made in the payment of the rental fixed by the lease and the lessor

had also been compelled to pay certain taxes which under the lease the lessee had agreed to discharge. An action for the unlawful detainer of the property was brought, after a due notice given to the lessee and the Investment Company to either pay the rental or surrender possession of the premises. In that action there were two counts or causes, in one of which was contained a statement of the several installments of rental which were due and unpaid. In the second cause of action there were detailed various amounts which the lessor had paid on account of the tax charges. The Investment Company did not deny that the rental charges had accrued as alleged, but insisted that there could be no recovery for taxes paid by the lessor, because that cause of action was improperly joined to the cause of action for the unlawful detainer of the property. The court made findings of fact which separately and distinctly found the various amounts of rental which were due, and separately the items of tax charges that had been paid by the lessor. After the entry of judgment in May, 1917, no stay having been granted and five days having elapsed from the entry of the judgment, writ of restitution was issued and the lessor was restored to the possession of the premises leased. The Investment Company appealed, and this court held that there could be no recovery for taxes paid in an action for the unlawful detention of real property. The cause of action under which that recovery was had being separately stated in the complaint, and the findings being complete upon the matter of the rental charges due, the judgment on appeal was to the effect only that the judgment of the lower court be modified by striking therefrom the amount which the superior court had found to be owing to the plaintiff on account of the tax charges. The opinion rendered on that appeal more fully states the facts of the case than we have included in the foregoing statement. (See *Chase v. Peters et al.*, 37 Cal. App. 358, [174 Pac. 117].) Upon the going down of the *remittitur* in that case the Investment Company, within five days after the *remittitur* had been received in the clerk's office of the county of San Diego, made application to the superior court to be restored to possession of the real property upon payment of the amount of rent which the judgment of the court had fixed. It is from the order denying that application that this appeal is taken.

In section 1174 of the Code of Civil Procedure, which refers to the form and substance of a judgment in an unlawful detainer suit, it is provided: "When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment as here provided be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately."

[1] It is the contention of the Investment Company on this appeal that the five days mentioned in the provision quoted did not commence to run as against it, because of the appeal taken, until after *remittitur* had been returned. Under the facts of the case as they have appeared, we think that the Investment Company was not entitled to the relief asked and that its application came too late. If it had desired to retain possession of the premises, it should have made tender into court of the amount of rent found due, as the section provides, within the five days after the judgment was entered. There was no order of reversal made as to that judgment. In fact, we have noted that the Investment Company did not dispute the amount claimed by the lessor on account of rent. The case appears to us to be in all respects the same as though the judgment appealed from in the former suit was a judgment for rent only and that that judgment had been affirmed upon appeal. In such a case there would seem to be no room to argue that the defaulting tenant was given a continuing right to be restored to possession of the premises from which he had been ousted, all during the period consumed by the appeal and for five days after *remittitur* had been returned. This was clearly not the intent of the legislature; such a construction of the statute would work a hardship against a lessor seeking to rid himself of a tenant who would not pay

his rent, for it would compel the landlord to hold the property in readiness to be restored during the whole time that was consumed by the taking of the appeal and until the determination thereof. This, to our minds, would be directly contrary to the whole design of the special remedy provided against defaulting tenants of real property.

The order appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 6, 1919.

All the Justices concurred.

[Civ. No. 2313. Second Appellate District, Division One.—September 8, 1919.]

C. S. WHITCOMB, Respondent, v. FRANK GIANNINI
et al., Appellants.

- [1] NEW TRIAL—ORDER DENYING MOTION—APPEAL—DISMISSAL.—An order denying a motion for a new trial not being appealable, an attempted appeal therefrom should be dismissed.
- [2] CORPORATIONS—ADJOURNMENT OF MEETING—NOTICE TO DIRECTORS. Where at a meeting of the board of directors of a corporation regularly held, a majority of the directors being present, action to adjourn to a later date was regularly taken, notice to the directors of the adjourned date was not necessary.
- [3] *Id.*—TIME FOR HOLDING MEETING—EFFECT OF HOLDING AT LATER HOUR.—The fact that the minutes of the meeting on such adjourned date showed that the directors assembled at 1 P. M. instead of 10 A. M., as ordered by the resolution of adjournment previously made, did not affect the regularity of its acts transacted at that meeting. In the absence of a showing to the contrary, it must be assumed that the directors met as soon as a quorum had assembled after the hour of 10 A. M.

2. Sufficiency of notice of meeting of directors, note, *Ann. Cas.* 1914D, 862.

- [4] **ID.—VALID ASSESSMENT—POSTPONEMENT OF SALE—IRREGULARITY—RIGHT OF STOCKHOLDER.**—Where the assessment was not invalid, and the stockholders were given notice of their delinquencies, the passage of a resolution postponing the date of sale and providing for notice of such delinquency at a meeting of the board of directors not regularly noticed, one member of the board being absent, constituted but an irregularity within the provisions of section 347 of the Civil Code which provides that a stockholder, in order to recover stock thus sold for delinquency assessments, must bring his action within six months of such sale.
- [5] **ID.—JOINT OWNERSHIP OF STOCK—NOTICE TO RECORD OWNER.**—Even though the corporation had knowledge that the stock was owned jointly by two persons, it was only bound to give notice of the assessment to the one in whose name the stock stood of record on its books.
- [6] **ID.—SALE FOR DELINQUENCY—PURCHASE BY DIRECTOR—ACTION TO RECOVER—BREACH OF TRUST.**—In this action brought to recover certain shares of corporate stock alleged to have illegally been made the subject of a sale for delinquent assessment and been bought by one of the directors of the corporation, the facts alleged and proven failed to show a case where the relation of such director to the stockholder was of such a confidential character as to make it a breach of faith or trust should he be permitted to purchase the stock.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge. Appeal from order denying new trial dismissed. Judgment reversed.

The facts are stated in the opinion of the court.

E. I. Feemster and Middlecoff & Feemster for Appellants.

Bradley & Bradley for Respondents.

JAMES, J.—This action was brought to recover ten shares of corporate stock, or the value thereof, which plaintiff alleged had been illegally made the subject of a sale for a delinquent assessment. Plaintiff had judgment, from which the defendants appeal. [1] There was also an appeal attempted to be taken from an order denying to defendants a new

6. Purchase of stock by director as affected by fiduciary relation to stockholder, notes, *Ann. Cas.* 1918B, 241; *L. R. A.* 1916B, 708.

trial; but as that order was not appealable, the appeal therefrom should be dismissed.

The contentions of the plaintiff, which were upheld by the trial court, were, first, that the meeting of the directors at which the assessment was levied was not legally called in that the directors were not given written notice of the time and place of hearing; second, that a subsequent meeting of the directors, at which a resolution was adopted postponing the sale of stock upon which the assessment had become delinquent, was illegally held in that the directors were not given written notice of the time and place of hearing; third, that the plaintiff as a stockholder never received a notice, nor was any sent to him, advising him of the delinquency; fourth, that defendant Giannini, who was the purchaser of the stock at the delinquency sale, being a director of the corporation the stock of which was then being sold, was ineligible and disqualified to bid at such sale. It appeared in evidence that the 4th of August, 1914, was the day regularly set by the by-laws of defendant corporation for the holding of the regular monthly directors' meeting. There were seven directors, all of whom were present except one on the day of this regular meeting. The directors present, after the meeting was convened, adjourned the regular meeting to August 11th, at 10 A. M. The minutes of the meeting of the directors, held on the eleventh day of August, showed that the meeting convened at 1 P. M., instead of 10 A. M., and that all directors again were present except one. The secretary of the corporation testified that he had given written notice by letter to this director, and that he had received a telephonic communication from the director stating that he would be unable to attend the meeting. There was no evidence offered to contradict this latter showing as to the notice having been given in writing to the absent director of the meeting of August 11th. No showing was made on the part of the plaintiff that the regular meeting of August 4th was illegally called or held, and if notice of that meeting was required to be given, it must be presumed in the absence of a contrary showing that such notice was given. (*Sferlazzo v. Oliphant*, 24 Cal. App. 81, at p. 86, [140 Pac. 289].) [2] The meeting of August 4th being regularly held and a majority of the directors being present and the action to adjourn to the later date of August 11th having been regu-

larly taken, no notice to directors of the adjourned date was necessary. See *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, [120 Pac. 15], where it is said: "A director receiving notice of a meeting was bound to know that a quorum might adjourn, and that business might be transacted at the adjourned meeting. And this is in accordance with the general rule, which is that no notice of adjournment of a meeting regularly called need be given." (Citing authorities.) Hence, not only was no notice required to be given to any director of the time and place for the holding of the adjourned directors' meeting, but the evidence without dispute shows that the only director absent on August 11th was notified in writing. [3] The fact that the minutes of the meeting showed that the directors assembled at 1 P. M., instead of 10 A. M., as ordered by the resolution of adjournment previously made, seems to us not to be material, for the reason that, in the absence of evidence to the contrary, it may be presumed that the directors met as soon as a quorum had assembled after the hour of 10 A. M., and especially in view, too, of the fact that no showing was made that the absent director appeared at 10 o'clock and failed to remain because of the lack of a quorum. He had previously notified the secretary that he would not appear. The directors' meeting of August 11th, at which the resolution was adopted levying the assessment against the stock of the defendant corporation, was, therefore, duly held and legally noticed and called. That the resolution levying the assessment was sufficient in form and substance is not disputed. In this resolution it was declared that the assessment levied thereunder should become delinquent on the sixteenth day of September, 1914, and that all delinquent stock on which the assessment had not been paid should be sold on the fifth day of October, 1914, at 2 o'clock P. M. On the first Tuesday in September, that being the time fixed by the by-laws for the holding of the regular monthly directors' meeting, a quorum was not present. Minority directors attempted to adjourn until September 2d. On September 2d a quorum was present and an adjournment was taken to September 17th. Five directors were present at the meeting of September 17th and an adjournment was again taken to October 3d. At the meeting of September 17th, at which there were present all but two directors, a resolution was adopted providing for the publication of a notice giving the

names of those delinquent and the stock held by them, and giving notice of sale which was to take place on the 5th of October, 1914, as previously determined in the resolution levying the assessment. At the October 3d meeting, at which all directors were present except one, the absent director being the director who is defendant here, Giannini, a resolution was adopted postponing the date of sale from October 5th to November 4th, and providing for publication of notice of such extension or postponement. We have already concluded that the proceedings up to and including the levying of the assessment were regularly taken and had, and the record further shows that subsequent proceedings, up to and including the date of delinquency as fixed in the resolution last referred to, were all completed as required by law. The resolution ordering the assessment contained complete direction for the publication of the necessary notice of sale for delinquencies (Civ. Code, sec. 337), and the publication of that notice, it is admitted, was had in accordance with the direction of the resolution.

[4] The question as to whether the meeting of October 3d was regularly called and held, that being the meeting at which the resolution was passed postponing the date of sale to November 4th, is next entitled to consideration. If all of the directors had been present at that meeting there would have been no question as to the legality of the action taken, regardless of the matter of notice having been given to any of them. (Civ. Code, sec. 320a.) It may be assumed that the court was correct in finding, as it inferentially did, that the requisite notices were not given of the meeting of October 3d. The assessment, as has been noted, was not invalid; the stockholders had notice of their delinquencies; hence, we think that the irregularity, if such it be, was one included within the provisions of section 347 of the Civil Code, which provides that a stockholder must in such case bring his action within six months after the date of sale. This action was commenced by the filing of a complaint on February 21, 1916; the sale of the stock was made in November, 1914. Assuming that the plaintiff as stockholder received all the necessary notices and that, as we have already decided, the levying of the assessment was regularly done, plaintiff's action would be too late.

[5] There is next to be considered the question as to whether at the times material to the levying of the assessment and making of the sale plaintiff was in fact a stockholder in defendant corporation and, if so, whether he was charged with notice. It is admitted by the defendants that no special notice was given to the plaintiff of the levying of the assessment, as required by section 336 of the Civil Code; that is, no notice was given to him other than such notice as might be imparted by that published in the newspaper. Admittedly the giving of notice by publication alone under the section of the code cited would not be sufficient. The ten shares of stock referred to in this controversy were originally issued to one Hall and had never been transferred from Hall to any person upon the books of the corporation up to and including the date of sale as made under the assessment. It seems that the defendant corporation was engaged in the business of furnishing a certain form of power to its stockholders. After Hall secured his stock he parted with some interest in land, which was affected by the stock, to this plaintiff, and the certificate of stock was taken to the office of defendant corporation and the person in charge notified of the fact that Whitcomb had become the owner of an undivided interest in the stock. There was testimony that the secretary of the corporation took the original certificate and, after the name of Hall appearing therein, wrote the name of this plaintiff. Plaintiff testified that he was the joint owner with Hall of the stock up to the time that Hall transferred his entire interest to the plaintiff. Under the issues made by the pleadings we must assume that this latter transfer was made after the sale for delinquent assessment. We have noted that the stock was never transferred upon the books of the corporation. It is shown that notice of the assessment was given to Hall, the record owner, and that none was given to the plaintiff. As far as can be gathered from the record the interest acquired by Whitcomb, the plaintiff, both in the property of Hall and in the stock of defendant corporation, which was useful principally in connection with that property, was in the nature of a partnership interest. Plaintiff in his testimony insisted that the interest was a joint interest, and if we are to assume that the corporation, because of the fact, as it appeared, that it had knowledge that both Whitcomb and Hall were being dealt with in connection with the

power furnished to the land, is estopped from denying that plaintiff held a stockholder's interest in the corporation, then we think that it is logically to be concluded that notice to Hall was notice to Whitcomb. We are strongly inclined to the conclusion that as the stock had never been transferred on the books of the corporation the latter was not bound to recognize Whitcomb as a stockholder when it gave notice of the assessment levied. While it is true that Whitcomb stated in his testimony that he asked the secretary to see that the books were changed, he made no request at any time to have any specific number of shares of stock assigned to him, or for any new certificate to be issued to him, but went away content with the writing in of his name after Hall's on the original certificate, after stating to the secretary that he had become "jointly" interested in the stock with Hall. Section 324 of the Civil Code provides that stock may be transferred upon the books of the corporation, and provides that "until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer," such transfer, except as between the parties, should not be valid. Under the facts shown we conclude, first, that assuming the plaintiff to have been a stockholder of defendant corporation and of whom defendant corporation was bound to take notice, the interest in the stock being a joint interest, notice to Hall of the delinquent assessment was notice to him. Secondly, that it is not correct to assume that the corporation was compelled to take notice of the plaintiff's interest in the stock, but that relying upon its records, there appearing not to have been a transfer made from Hall to plaintiff, the only notice that was required to be expressly given of the levying of the assessment was notice to Hall. [6] The claim made and to which countenance was given by the trial judge, that Giannini, being a director at the time of the levying of the assessment and the sale made, was ineligible and disqualified from bidding at the sale or of purchasing stock sold thereat, we are not prepared to sustain. The facts shown in no way illustrate a case where the relation of the director to the stockholder was of such a confidential character as to make it a breach of faith or trust should he be permitted to purchase the stock.

In our opinion, the trial judge was in error in the making up of his conclusions as to the rights of the plaintiff.

The appeal from the order denying defendants' motion for new trial is dismissed. The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2298. Second Appellate District, Division One.—September 8, 1919.]

OLIVER V. BLACKBURN, Respondent, v. R. S. MARPLE,
Appellant.

[1] NEGLIGENCE—AUTOMOBILE COLLISION—ACTION FOR DAMAGES—EVIDENCE—FINDINGS—APPEAL.—This action for damages alleged to have been suffered through the negligence of the defendant in the operations of his automobile whereby it was caused to collide with an automobile operated by the plaintiff, on the evidence, was peculiarly one which called for the judgment of the trial court upon the question as to the negligent act of the defendant, and the trial court having solved the question in favor of the plaintiff, the appellate court could not say from the transcript of the evidence, that the findings of the trial court were in any way unsupported by the evidence.

[2] ID.—APPROACH OF INTERSECTING WAY—OPERATION AND CONTROL OF MOTOR VEHICLE—CONSTRUCTION OF LAW.—The intent of the Motor Vehicle Law, in requiring that the operator of a motor vehicle, upon approaching an intersecting way where the view is obstructed, must not travel at a greater rate of speed than ten miles an hour, is that it shall be brought to the speed indicated by the time it shall reach the intersecting way in order that it may be fully under control of the operator; and in this action it cannot be said that plaintiff violated the provisions of such statute, he having been traveling at the rate of about twenty miles per hour, his machine being under control, but having slowed down to about eight miles per hour at the time his machine was struck by the defendant's machine, he not having yet entered upon the intersecting way.

2. Effect of speed and application of speed regulations on liability for collision between automobiles at or near corner of streets or highways, note, L. R. A. 1916A, 747.

[3] **ID.—LAST CLEAR CHANCE.**—Under the facts of this case there was nothing which would make the doctrine of the last clear chance applicable to either party.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Tanner, Odell & Taft for Appellant.

Porter C. Blackburn for Respondent.

JAMES, J.—Plaintiff was awarded judgment for the sum of \$350 against this appellant on account of damages alleged to have been suffered through the negligent acts of the defendant R. S. Marple. The particular act of negligence alleged was that said defendant so operated an automobile driven by him as to cause it to collide with an automobile which was then being operated by the plaintiff. The appeal is taken from the judgment.

The particular facts upon which the judgment was entered are quite fully embraced in the findings of the trial judge, the most material portions of which we quote: "That on the fourteenth day of July, 1915, at or about the hour of 6:30 P. M., while it was still light, the plaintiff was driving a Ford automobile along a public highway known as the state highway, leading from the town of Whittier to the town of Fullerton, in an easterly direction, about one mile east of the county line of Los Angeles and Orange Counties. That the plaintiff was driving his Ford car at a speed of twenty miles per hour. That the plaintiff was seated in the front seat of his car with a small child on his right side, and that his wife and two small children were seated in the rear seat. That the state highway runs in an easterly and westerly direction at the above-mentioned place, and that there is an intersecting highway that enters the said state highway from the south, known as the La Habra road, and that the said La Habra road intersects the said state highway by two long, sweeping curves, one curve turning into the said state high-

3. Origin, function, and mode of operation of the last clear chance, note, 55 L. R. A. 418.

way to the left and one curve turning into the said state highway to the right as the said La Habra road approaches the intersection with the said state highway. That the said La Habra road does not cross the said state highway. That in the center of the two sweeping curves and at the junction with said state highway there is a triangular piece of ground, which is not paved but subject to travel, being oiled and rolled. That the said state highway and the said La Habra road are about 60 feet wide, with a paved portion in the center of 18 feet, and that said highways are used by the public for travel. That there is a row of electric light poles on the south side of the said state highway near the property line, and a row of orange trees about four feet south of the south property line. That the plaintiff, who was driving his Ford car, on approaching the said intersection of the two highways, saw an Overland car, driven by the defendant, approaching the said state highway by the long sweeping curve that branches from the said La Habra to the left as the said state highway is approached from the south. That the plaintiff saw the approaching Overland touring car turning into the said state highway, and immediately turned to his right, and slowed his Ford car down to eight miles per hour. That the defendant also slowed his car down, but after he had arrived at about the center of the said state highway, and his car was approaching the north side of said state highway, he turned his car abruptly to his left, and continually turned the same to his left, with the same pointed in a southwesterly direction and toward the south side of the said state highway. That the defendant drove his car in such a negligent manner that the same was pointed and directed toward the side of the plaintiff's machine near its front. That the plaintiff kept turning his machine to his right and to the south of the said state highway, whereupon he was forced to turn off the said state highway into an orange orchard, within about two feet of an electric light pole, and under the branches of an orange tree, and the plaintiff's machine was struck by the front end of the defendant's machine on the left side and near its front."

Appellant's contentions may be briefly stated under two heads: (1) That under the evidence the court was not justified in making findings against appellant; (2) that, conceding that the evidence showed negligence upon the part of appellant,

the evidence also showed contributory negligence upon the part of the plaintiff. There was a conflict in the evidence concerning the manner in which the accident occurred; hence as to findings made under such evidence the conclusions of the trial judge must be here treated as final. Appellant has argued that under all of the evidence it must be concluded that it was impossible that the accident could have happened in the manner described by the plaintiff. After carefully examining the printed transcript of the testimony heard, we cannot agree with this contention. Plaintiff testified that he was traveling easterly along a straight road and that two hundred feet away from where the intersecting road upon which the defendant was traveling emerged he observed the defendant and immediately slowed down his machine, he then being upon the extreme right of the highway, and that the defendant, instead of keeping to the right and making the turn along the curve of the intersecting road, turned toward the left; that the plaintiff guided his machine off from the highway into the soft dirt on the right-hand side thereof and that the defendant's car collided with him. The point of collision was not within any part of the intersecting highways, but was about opposite the most westerly point of the intersecting curve. A physician, who was traveling in an automobile immediately behind the plaintiff, testified that the plaintiff was on the right side of the road and that he (the witness) saw the automobile of the defendant emerge from the road intersecting at the right and that the defendant's vehicle passed across the front of the plaintiff's machine and appeared in view at the left thereof and that the collision occurred immediately thereafter. There was testimony of several witnesses that the appellant stated immediately after the accident that he had become confused, and had thought that the plaintiff intended to travel directly eastward, and that he (appellant) turned to the left to allow the machine of the plaintiff to go on at his right. [1] On the evidence the case was peculiarly one which called for the judgment of the trial court upon the question as to the negligent act of appellant, and we find nothing at all appearing in the transcript of the evidence which would justify us in the conclusion that the findings of the trial judge are in any way unsupported by the evidence.

The findings of the trial court further negative the claim of appellant that the plaintiff had been guilty of contributory negligence proximately causing or contributing to cause the accident. Appellant cites us to a provision of the motor vehicle law, found in the Statutes of 1913, at page 649, which requires that the operator of a motor vehicle, where the view is obstructed, upon approaching an intersecting way must not travel at a greater rate of speed than ten miles an hour. Just previous to the accident plaintiff had been traveling at the rate of about twenty miles per hour. The evidence showed that his machine was under control and he himself testified that upon observing the appellant two hundred feet away, emerging from the intersecting road, he slowed down his machine and kept to the right. When he was struck by appellant's automobile his machine was traveling about eight miles per hour. At that point, as we have before noted, he had not entered upon the intersecting way. [2] The intent of the law, as we view it, in restricting the speed at which a motor vehicle may travel at such a point, is that it shall be brought to the speed indicated by the time it shall reach the intersecting way in order that it may be fully under control of the operator. It cannot be said under the evidence that it was established that the plaintiff violated the provision of the statute cited. The case of *Cook v. Miller*, 175 Cal. 497, [166 Pac. 316], cited on behalf of appellant, was not the same in its facts as the case here presented. [3] Neither was there anything in the facts under the evidence which would make the doctrine of the last clear chance applicable to either party.

The judgment appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2294. Second Appellate District, Division One.—September 8, 1919.]

SAN JOAQUIN LIGHT & POWER COMPANY (a Corporation), Respondent, v. **C. H. BARLOW**, Appellant.

- [1] **ASSUMPSIT — ELECTRICITY FURNISHED UNDER CONTRACT — CORRESPONDENCE AS EVIDENCE OF REASONABLE VALUE.**—In an action upon a common count for the reasonable value of electric current delivered by plaintiff to the defendant, correspondence between the parties authorizing the plaintiff to deliver electricity and to charge therefor at a stated rate is admissible to prove that the rate charged was reasonable, although such correspondence proved a contract price.
- [2] **ID.—EXCLUSION OF EVIDENCE — FORMAL RULING AND EXCEPTION IMPLIED.**—In this action to recover the reasonable value of electric current delivered by plaintiff to the defendant, although no question was formally propounded to the witness on cross-examination, as to the reasonableness of the rate charged, with a ruling thereon from which under the statute an exception would be implied, the statements of the court to the effect that the only issue was as to the amount of current furnished, and that it did not see that there was any open question as to the reasonableness of the rate, to which counsel for defendant, without any direct exception, responded that on the ruling of the court he would not ask any further questions on cross-examination as to the reasonableness of the rate, was equivalent to such formal ruling and exception.
- [3] **ID.—CURTAILMENT OF CROSS-EXAMINATION—PREJUDICIAL ERROR.**—In such action, the refusal of the court to permit the only witness produced by plaintiff on the subject of the reasonable value of the electricity furnished to defendant to be cross-examined for the purpose of testing his qualifications as a witness on the question of reasonable value, and for the purpose of showing that the charge was not reasonable, was prejudicial error.
- [4] **NEW TRIAL — ORDER DENYING — APPEAL.**—Where the court's order denying a motion for a new trial was made after the right of appeal from such orders had been taken away by amendment of the statute, an appeal therefrom will be dismissed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Fred H. Taft, Judge. Judgment reversed; appeal from order denying new trial dismissed.

The facts are stated in the opinion of the court.

Frank P. Doherty for Appellant.

Stuart M. Salisbury for Respondent.

CONREY, P. J.—In this action the plaintiff seeks to recover the sum of \$655.20 upon a common count for the alleged reasonable value of electric current delivered by plaintiff to the defendant. From a judgment awarding the demanded sum of money the defendant appeals.

The plaintiff introduced in evidence certain correspondence between the parties, constituting a contract which authorized the plaintiff to deliver electricity and to charge therefor at a stated rate. The evidence further shows that a stated quantity of electric current was delivered, and that the amount due therefor, when computed in the manner and at the rate named in the contract, is the sum demanded in this action. Simpson, a clerk whose duty it was to compute charges from meter readings brought into plaintiff's office, testified for the plaintiff, and stated that the several charges made were reasonable charges for the service rendered.

The errors claimed and relied upon, as we glean them from the briefs of appellant's counsel, are as follows: (1) That the letters were not admissible to prove a contract price, because the plaintiff's complaint counts upon reasonable value and not upon a contract price; (2) That the court erred in preventing cross-examination of Simpson for the purpose of testing his qualifications as a witness on the question of reasonable value, and for the purpose of showing that the charge was not reasonable.

[1] 1. Although the letters received in evidence proved a contract price, they by virtue of that fact were also evidence tending to prove that the rate charged was reasonable. "A promise to pay a specific sum is some evidence of value." (*Steward v. Hinkle*, 72 Cal. 187, 191, [13 Pac. 494, 495].) "Where an express contract has been fully performed by plaintiff and nothing remains to be done under the contract but the payment of money by defendant, and plaintiff sues on *indebitatus assumpsit* instead of on an express contract, the contract is admissible as evidence of the amount due, and it is the best evidence of such amount, and *prima facie* establishes it." (5 Corpus Juris, 1409.)

[2] 2. On cross-examination of Simpson, after some questions had been asked and answered, relating to the conditions under which the service was to be rendered, and for the stated purpose of reaching the question of what was a reasonable rate, counsel for plaintiff objected that defendant could not go into these matters, on the ground that defendant, by entering into the contract, was estopped to question the reasonableness of the rate. After discussion, the court announced that "the only issue here is of them furnishing the amount for which they are charging." Mr. Doherty: "You mean no further testimony allowed on the proposition of whether or not the rate fixed by them was a reasonable rate under the issue of their pleadings?" The Court: "I don't see that there is any open question there." On the ruling thus made, defendant's counsel refrained from further cross-examination on the reasonableness of the rate.

To the statement made by the court, and without any direct exception, counsel responded, "Well, on the ruling of the court, then, I will not ask any further questions on cross-examination as to the reasonableness of the rate."

Although no question was formally propounded, with a ruling thereon from which under the statute an exception would be implied, the record made, as above stated, was equivalent to such formal ruling and exception. (*Pastene v. Pardini*, 135 Cal. 431, [67 Pac. 681].)

[3] The court erred in thus cutting off, substantially at its beginning, the cross-examination of Simpson on the subject of reasonable value of the electricity furnished to defendant. The effect of the ruling was to leave his testimony, as given on direct examination, unaffected by any additional statements by which it might have been modified on the cross-examination. No other witness on the subject was produced by plaintiff, and this evidence had such an important bearing on the fact at issue, that the defendant was seriously prejudiced by the court's refusal to allow the cross-examination to proceed as indicated.

[4] As the court's order denying defendant's motion for a new trial was made after the right of appeal from such orders had been taken away by amendment of the statute

(Code Civ. Proc., sec. 963, [Stats. 1917, p. 624]), the appeal from that order is dismissed.

The judgment is reversed.

Shaw, J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 30, 1919.

[Civ. No. 1879. Second Appellate District, Division One.—September 8, 1919.]

HERBERT STANDING, Appellant, v. OLIVER MOROSCO,
Respondent.

- [1] **STATUTE OF FRAUDS—CONTRACTS NOT IN WRITING—ESTOPPEL TO ASSERT STATUTE—UNCONSCIONABLE INJURY.**—The mere omission to insist that a writing be made, or reliance only upon the unfulfilled promise of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other to his prejudice; and not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established.
- [2] **ID.—TERM OF EMPLOYMENT—CONSTRUCTION OF MEMORANDUM.**—Where a memorandum with reference to one's employment contains no words fixing the term of service, but the compensation is to be paid at a weekly rate, the term should be construed as being from week to week.
- [3] **ID.—PROMISE TO EXECUTE CONTRACT—SUFFICIENCY OF PAROL.**—A promise to execute "the usual theatrical contract" would be of no more potency when expressed in writing than by parol.
- [4] **ID.—CONTRACT FOR PERSONAL SERVICES—ACTION FOR BREACH—INSUFFICIENT ALLEGATIONS OF ESTOPPEL.**—In this action for damages

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1. Estoppel to plead statute of frauds, note, 134 *Am. St. Rep.* 173.
 2. Right to discharge employee where contract of hiring specifies no term but fixes compensation at a certain amount per day, week, month or year, notes, 11 *A. L. R.* 469; 51 *L. R. A. (N. S.)* 629.

alleged to have been sustained by the plaintiff through the refusal of the defendant to use and pay for the services of the plaintiff after having employed him for a period of one year as an actor to appear in plays produced by the defendant, the complaint did not make out a case entitling the plaintiff to enforce his contract, which was not in writing and, therefore, admittedly within the statute of frauds.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Paul W. Schenck and Joseph Citron for Appellant.

Searborough & Bowen for Respondent.

JAMES, J.—The demurrer of defendant on general and special grounds was sustained to the third amended complaint of the plaintiff and leave to further amend was denied. Judgment of dismissal followed, from which plaintiff appealed.

The cause of action attempted to be alleged was one for damages sustained by the plaintiff through the refusal of the defendant to use and pay for the services of the plaintiff after having employed him as an actor to appear in plays produced by the defendant in his theater at Los Angeles. Plaintiff alleged that the engagement was for a period of one year. It is respondent's contention that the complaint in its allegations showed a case falling within the statute of frauds, and that plaintiff could not recover because the term of employment was not fixed in any writing. An agreement which is not to be performed within one year from the making thereof, in order to be valid, must be expressed in writing. (Civ. Code, sec. 1624, subd. 1.) In order to avoid the effect of the statute, it is appellant's position that there was such part performance of the contract shown as to raise an estoppel against respondent, preventing him from questioning the validity of the contract or its enforceability. The rule referred to is an equitable one which holds it to be a fraud under some circumstances to permit a party to make the defense that a contract is void or unenforceable because not in writing. [1] Every person is advised of the plain requirement of the statute, and the mere omission to insist that a writing be made, or reliance only upon the unfulfilled promise

of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other to his prejudice; not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established. (See Browne on Statute of Frauds, 5th ed., sec. 457; *Glass v. Hulbert*, 102 Mass. 24, [3 Am. Rep. 418], both cited in *Seymour v. Oelrichs*, 156 Cal. 782, [134 Am. St. Rep. 154, 106 Pac. 88].) The complaint of plaintiff shows: That in December, 1912, plaintiff was employed as an actor in the city of New York by defendant at the weekly salary of two hundred dollars, and that he had been engaged for a certain play. (How long this play was to run, or for what period of time plaintiff was under contract at two hundred dollars per week, is not alleged.) It is alleged that defendant promised and agreed that if plaintiff would reduce his salary to \$150 per week and remove to Los Angeles, defendant would employ him for a period of one year; that defendant promised to execute a contract in writing employing plaintiff for one year; that plaintiff accepted the agreement, relying wholly upon the representations made, and "refused to accept other employment which had been tendered him, and otherwise injuriously changed his position and removed to the city of Los Angeles." (What the compensation or term of service would have been under the alleged employment offered, or how plaintiff's position was "injuriously changed," does not appear.) There is the further allegation that plaintiff's wife remained in New York, "as was agreed," and disposed of plaintiff's home and household furniture, and that two months after plaintiff came to Los Angeles his wife came also, and that the transportation was furnished to her by defendant; that on the fifteenth day of March, after plaintiff had been employed in Los Angeles by defendant for two and one-half months at \$150 per week, defendant discharged plaintiff and refused to accept his offered services; and refused to "complete the execution of the said contract of employment which the said defendant promised and agreed at various times to

deliver to the plaintiff, and repudiated his promises and representations made to this plaintiff." It is further alleged that defendant knew that a detrimental change of position and situation on the part of plaintiff would be necessary in the event plaintiff relied on defendant's said promises and representations; that the said promises and representations of the defendant were made with the knowledge and with the intent that they should be relied on by plaintiff and the change in his position thereby induced. A written memorandum, alleged to have been signed by defendant in New York, was set forth. It was in the following words:

"Mr. Standing,

"I will pay you one hundred and fifty (\$150.00) dollars per week in Los Angeles for the length of your engagement there, under the terms of the usual theatrical contract.

"As you have reduced your salary with me I will be very glad to pay the transportation and sleeper of Mrs. Standing two mo's hence to Los Angeles.

"This will hold good only when we execute regular contract,
O. M. (Signed)

"Yours very truly,

"O. Morosco." (Signed)

[2] The memorandum contains no words fixing the term of service. The compensation was to be paid at a weekly rate; hence the term should be construed as being from week to week. This without reference to section 2010, of the Civil Code, which imposes that rule of construction upon contracts for the employment of a "servant." A servant is defined in the preceding section to be one employed to render personal service "otherwise than in the pursuit of an independent calling," and one who remains entirely under the direction and control of his master. It is not alleged what "the terms of the usual theatrical contract" were—they may have related wholly to matters of detail. And so the writing does not help the complaint except to show that the defendant agreed to execute "the usual theatrical contract." [3] This promise would be of no more potency when expressed in writing than by parol.

[4] We cannot conclude that the case alleged is one showing that plaintiff is entitled to enforce his contract, which is admittedly within the statute of frauds. That he suffered detriment because of any action taken by him and in reli-

ance upon the promises of defendant, the facts alleged do not show. Neither monetary loss nor great personal inconvenience can be presumed to have resulted to him. His property in New York may have been disposed of at a profit; the other employment tendered him may have been undesirable, of short duration, or covered by small prospective compensation. The change of residence from New York to Los Angeles may have been an agreeable one. The contract that plaintiff relinquished under which he was receiving two hundred dollars per week, may have been one for weekly employment only. Assuming against the pleader, as we must, all facts reasonably consistent with the facts alleged, but adverse to the plaintiff, it cannot be said the complaint makes out a case entitling the plaintiff to the relief sought.

The judgment appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 6, 1919.

All the Justices concurred, except Wilbur, J., and Lennon, J., who did not participate.

[Crim. No. 853. First Appellate District, Division Two.—September 8, 1919.]

THE PEOPLE, Respondent, v. GEORGE WAGNER,
Appellant.

[1] CRIMINAL LAW—BURGLARY—INTENT—EVIDENCE.—The question of criminal intent is one to be determined by the jury from all the evidence; and where, as in this prosecution for burglary, the evidence produced by the state is believed by the jury and is sufficient to support the verdict, any conflict between the evidence of the defendant and that produced by the state must be resolved against the defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Dunne, Judge. Affirmed.

The facts are stated in the opinion of the court.

Ralph Starke, Bradley V. Sargent and Vincent Surr for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

BRITTAIN, J.—The appellant was convicted on an information charging burglary by entering "the house, room, apartment, tenement, shop, warehouse, store and building" of Michael Logue, in San Francisco. The only question is regarding the sufficiency of the evidence to show burglarious intent.

Logue, the complaining witness, operated a saloon. Back of the saloon ran a passageway, on which opened the living apartments he occupied with his wife. From the passageway also opened a washroom, from which there was a door to an alleyway. Evidently there was another door leading either from the passageway or the washroom to an inclosed yard. Shortly before 10 o'clock on the night in question the appellant, a stranger, entered the saloon and was served with liquor. About 10 o'clock the saloon was closed by Logue. He went to his living apartments across the hall, and, after closing the door from the passageway to the living apartments, he retired with his wife. The door was fitted with a Yale spring lock, which, the evidence showed, automatically locked the door when it was tightly closed. Logue testified that he had slammed the door. Shortly before midnight Logue was awakened by his wife, who said something unusual was occurring in the corridor. He arose and on going to the door leading to the passageway found it open and saw the appellant standing there. He slammed the door and he testified the appellant then tried to shove the door in, and that the appellant made some exclamation, which Logue described as a "yell of disappointment." Logue immediately went into another room, the back one of the living apartments, and saw the appellant trying to get over the fence from the yard. The appellant then ran out of the alleyway. Logue telephoned to the police station, and after a few minutes accompanied an officer to Daly City, where the appellant was arrested, after having been identified by Logue. At that

time the appellant had whitewash on the upper portion of his clothing, which it was claimed was from the fence of the yard. The officer testified that when the appellant was arrested, in response to a statement of the officer that Logue claimed he had committed burglary at his residence, he said, "You have the right man—I am the man."

On behalf of the appellant it is argued that under the presumption of innocence which attends the accused, and in view of the silence of the record as to the appellant leaving the saloon after he was served with drinks, the state failed to show a burglarious intent on the part of the appellant. It is argued that he may have gone into the corridor under the influence of liquor, and on coming to his senses after the saloon was closed, he was simply trying to find a way out of the corridor. The appellant relies on the rule announced in *People v. Barry*, 94 Cal. 484, [29 Pac. 1026], and *People v. Britton*, 142 Cal. 10, [100 Am. St. Rep. 95, 75 Pac. 314]. The defendant took the stand on his own behalf and testified that on the day in question he had been drinking.

[1] The question of criminal intent is one to be determined by the jury from all the evidence. (*People v. Swalm*, 80 Cal. 46, [13 Am. St. Rep. 96, 22 Pac. 67]; *People v. Noon*, 1 Cal. App. 44, [81 Pac. 746].) The evidence that the locked door of the living apartments was opened; that the appellant was discovered at the door, and concerning his statement to the arresting officer, was believed by the jury who heard the testimony. It was sufficient to support the verdict, and any conflict between the evidence of the appellant and that produced on behalf of the state on appeal must be resolved against the appellant. (*People v. Emerson*, 130 Cal. 562, [62 Pac. 1069].)

The judgment is affirmed.

Langdon, P. J., and Nourse, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 6, 1919.

Angellotti, C. J., Shaw, J., Lawlor, J., and Wilbur, J., concurred.

[Crim. No. 864. First Appellate District, Division Two.—September 11, 1919.]

THE PEOPLE, Respondent, v. RAMON RAZO, Appellant.

- [1] **CRIMINAL LAW — ROBBERY — LIMITATION OF CROSS-EXAMINATION — POWER OF COURT.**—The trial court has the power to exercise a reasonable control over the cross-examination of a witness; and in this prosecution for the crime of robbery the court properly excluded certain questions directed toward the matter of whether the prosecuting witness actually had the coins alleged to have been taken from him, where this matter had already been testified to repeatedly by such witness upon his cross-examination.
- [2] **Id.—DISCUSSION OF CASE WITH PROSECUTING WITNESS — STATEMENTS OF DISTRICT ATTORNEY IN ARGUMENT—MISCONDUCT—ERROR NOT PREJUDICIAL.**—In his argument to the jury, statements of the district attorney of his own knowledge, as distinguished from the summing up of the testimony of the prosecuting witness, that such witness had not talked the case over with him, would be misconduct upon his part, but not such prejudicial error as to warrant a reversal of the judgment where the repeated unequivocal statements of the witness were that he did not talk the case over with the district attorney and his testimony was uncontradicted on this point.

APPEAL from a judgment of the Superior Court of Alameda County. James G. Quinn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Milton W. Sevier and George M. Naus for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

LANGDON, P. J.—This is an appeal by the defendant from a judgment of conviction of the crime of robbery. The appellant presents three points upon the appeal. We shall discuss them in the order in which they are urged. The first is that the cross-examination of the complaining witness Scott upon a vital fact was improperly and unnecessarily limited by the trial court. Scott testified that on November 14, 1918, at about 10 o'clock in the evening, he was walking along the street in Oakland when he was attacked by the defendant

and another person; that the defendant knocked him down and cut him with a knife and the other person searched his pockets and took from them two coins, a five and ten cent piece. Appellant argues that as it was necessary for the state to prove that the defendant actually took some property from Scott, that, therefore, the question of whether Scott actually had the coins becomes decisive. He urges that the excluded questions were directed toward this matter and should have been allowed. But this matter was testified to repeatedly by Scott upon his cross-examination. He said he had a Canadian dime and a nickle in his pocket when he left his home, a few moments before the attack; that he looked at the coins before leaving home, and that he knew they were there; that he had his hand in his pocket and felt such coins as he was walking on the street and up to the moment of the attack; that his pockets were good and that the money could not have rolled out in the struggle on the sidewalk. Scott was a negro Pullman porter. It is true that he did not always answer questions as directly as might have been desired; but his examination discloses no effort to evade, but merely the difficulties which come from a lack of precision in speech and in thought, the natural consequences of lack of training. It is evident that he had difficulty in comprehending the exact meaning of many of the questions, and this in itself made it necessary for many questions to be asked a number of times. The court permitted this, and it seems to us that the cross-examination is very complete and comprehensive. Appellant contends that he should have been allowed to ask five certain questions. It is not necessary to discuss the relevancy of each of these questions here. In so far as they were relevant and proper cross-examination, their substance was covered several times in the course of the cross-examination. It appears that the direct examination of Scott covers seven typewritten pages in the record, while the cross-examination covers over fifty pages. [1] The trial court has the power to exercise a reasonable control over the cross-examination of a witness (Code Civ. Proc., sec. 2044), and we think that was all that was done in this case.

[2] The second point urged by appellant is that the deputy district attorney was guilty of misconduct in his argument to the jury. The facts relating to the incident complained of are that the attorney for the defendant upon

cross-examination asked the complaining witness several times if he had talked the case over with the deputy district attorney, to which he replied that he had not. In reply to further questions, Scott stated that he had gone to the office of the deputy district attorney at the close of the trial on the first day and had remained there a short time, but they had not talked about the case; that during the three or four minutes that he remained in the office of the deputy district attorney, said deputy was talking to someone else and he (Scott) was waiting for him to finish talking. In his argument to the jury, the deputy district attorney referred to the attempts of counsel for the defendant to impute to him improper practices in the preparation of his witnesses for the trial; he admitted that he had talked with all the witnesses in the case with whom he had had an opportunity to talk, as a regular and customary part of his duty. He continued as follows: "I say, frankly, and very gladly, that every witness that I could get my hands on who was going on the stand, told me definitely what his testimony was going to be, because I wanted to know what the testimony was going to be." At this point he was interrupted by the counsel for the defendant, who objected to these remarks for the alleged reason that they contradicted the testimony of the witness Scott, who had testified that he did not talk with the deputy district attorney. The deputy district attorney then, in reply to this objection, explained his remark to the jury by saying: "I said every witness that I could get my hands on; I could not get my hands on Mr. Scott." Attorney for the defendant then called attention to the testimony of Mr. Scott, saying: "And Mr. Scott's further testimony was that he was in Mr. Agnew's room, with the door closed." To which the deputy district attorney answered: "The testimony of Mr. Scott was that he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him." Appellant contends that this statement of the deputy district attorney, explaining why he did not talk to Scott, was outside of the record and corroborated the witness, and was, therefore, improper. As the statement appears in the record it is susceptible of being construed as a statement of the testimony of Mr. Scott, and as such it is sustained by the record, for we find upon cross-examination that Scott

testified as follows: "Q. Where did you go with him, after you went through that door? A. Out in his office. Q. Into his office? A. Yes, sir. Q. What did he talk about in there, the weather—what did he talk about? A. Talked about nothing. Q. Didn't talk about anything. How long were you in the room with him? A. About three or four minutes. Q. What did he do during the time you were in his office three or four minutes? A. He was talking to someone else." And again: "Q. What were you doing during the three or four minutes, or whatever time it was, that you were in Mr. Agnew's office yesterday evening? A. I was waiting for him to get through talking." Scott also testified that he went to the office of the deputy district attorney for the purpose of discussing the case.

It does not seem to be an improper summing up of this testimony to say that "the testimony of Mr. Scott was that he had not talked the case over with me at all; he came to my room intending to talk it over with me, but I was busy and did not talk it over with him." However, let us assume that the appellant's construction of this remark is correct and that the deputy district attorney was not referring in the latter part of the sentence to the testimony of Scott on the stand, but was stating his own knowledge of the subject. While clearly this would be misconduct upon his part, yet such misconduct, we think, under the special circumstances of this case, would not be such prejudicial error as to warrant a reversal. Appellant's argument is based upon an insistence that the fact of whether or not the witness Scott talked with the deputy district attorney was important to the defendant's case. But we have the repeated, unequivocal statement of Scott that he did not talk to him. There is a presumption that follows the testimony of every witness that such witness speaks the truth, and this witness remains uncontradicted on this point. Both Scott and the deputy district attorney admitted that they wished to talk to one another about the case. Scott testified that he went to the office of said deputy for the purpose of talking about the case and the deputy district attorney stated in his argument to the jury that he talked with every witness in the case that he could "lay his hands on," and would have talked with Scott if he had had the opportunity. The reason why this avowed intention and desire on the part

of both was not carried out cannot have any bearing upon the matter one way or the other.

The last point made by the appellant is that the judgment is erroneous because the indeterminate sentence law (Pen. Code, sec. 1168), under which it is imposed, is unconstitutional. It is unnecessary for us to discuss this question, because it has been passed upon in *In re Lee*, 177 Cal. 690, [171 Pac. 958], which upholds the validity of this section as to offenses committed after its enactment.

The judgment is affirmed.

Nourse, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 10, 1919.

All the Justices concurred.

[Civ. No. 8042. First Appellate District, Division Two.—September 12, 1919.]

**BAYSIDE LAND COMPANY (a Corporation), Appellant,
v. MRS. EVA PHILLIPS et al., Respondents.**

[1] **VENDOR AND VENDEE — FAILURE TO MAKE PAYMENTS AS AGREED — ACCEPTANCE OF LESS THAN AMOUNT DUE — WAIVER AND REVIVAL OF RIGHT OF FORFEITURE.**—Where the vendees do not make payments punctually, and the vendor for nearly two years indulges them in this and accepts payments from time to time of less than the whole amount due at the time of such payments, such conduct operates as a waiver of that clause of the agreement making time the essence thereof, and creates such a temporary suspension of the right of forfeiture as can only be restored by giving definite and specific notice of an intention to enforce it.

[2] **ID.—REVIVAL OF RIGHT OF FORFEITURE — BURDEN OF PROOF — EVIDENCE—FINDING.**—In this action by the vendor to quiet title to certain real property in which the defendants claimed an interest

1. Vendor's acceptance of payment tendered after time specified as waiver of provision making time of essence of contract, note, 2 A. L. R. 996.

under a contract of purchase, the plaintiff having conceded the waiver of the right of forfeiture, the burden was on him to show a revival of the terms of the contract by proof of a definite and specific notice of the intention to enforce it; and as the evidence on this issue was evasive, indefinite, and conflicting, the trial court was justified in its finding that such notice was not given.

- [3] **ID.—FAILURE TO GIVE NOTICE—FINDINGS ON OTHER ISSUES IMMATERIAL.**—In such action, the plaintiff having thus waived the right of forfeiture and having failed to prove the revival of that right, the trial court having found that notice of the intention to enforce the terms of the contract was not given, failure of the court to find on other issues became immaterial where a finding on each of those issues in favor of the plaintiff would not support a judgment in its favor.

APPEAL from a judgment of the Superior Court of Orange County. W. H. Thomas, Judge. Affirmed.

The facts are stated in the opinion of the court.

Bordwell & Mathews for Appellant.

Evans, Abbott & Pearce for Respondents.

NOURSE, J.—Action to quiet title to real property in which defendants claim an interest by reason of a written contract, entered into between the parties hereto, by which plaintiff agreed to sell and defendants agreed to buy said property. The trial court rendered judgment in favor of defendants, from which plaintiff appeals. Said contract was found by the court to have been executed on or about August 28, 1913. The provisions material to this appeal are as follows: "Said lot being sold for the sum of seven hundred (\$700) dollars gold coin of the United States, and the said parties of the second part, in consideration of the premises, agree to pay to the said party of the first part the said sum of seven hundred (\$700) dollars, as follows, to wit: The sum of seventy (\$70) dollars, cash, receipt whereof is hereby acknowledged; the further sum of ten (\$10) or more dollars on or before the twenty-eighth day of each and every month hereafter until the full amount of principal with interest on deferred payments has been fully paid; all to bear interest from date until paid at the rate of six (6) per cent per annum, payable and compounded semi-annually. And the said

parties of the second part agree to pay all state and county taxes, and assessments of whatsoever nature, which may become due on the premises above described. It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof, by the said parties of the second part, said party of the first part shall be released from all obligations in law or equity to convey said property, and the said parties of the second part shall forfeit all right thereto."

Appellant contends that defendants' interest in said contract, and in the land therein involved, terminated on the twenty-seventh day of November, 1915, by reason of the exercise of the forfeiture clause therein contained. Defendants, on the other hand, deny plaintiff's right to exercise such forfeiture by reason of the waiver of that provision of the agreement.

It appears from the record that on November 27, 1915, the total amount paid on said contract was \$177.43, principal and interest; that on said date there was a total delinquency of \$231.15, made up as follows: Nineteen principal payments, amounting to \$190; accumulated interest, amounting to \$35.18; delinquent taxes, covering a period of two years, amounting to \$5.97. It also appears that the last payment on the contract, amounting to \$7.50, was made July 30, 1915; that some time subsequent to that date (the time is not otherwise fixed by any evidence) Mrs. Harmer, one of the defendants, attempted to make a further payment of five dollars, but that plaintiff refused to accept it, stating that the contract had been canceled November 27, 1915; that on March 20, 1916, defendants offered plaintiff a check for \$290, the full amount then delinquent, but that plaintiff refused to accept the same.

[1] Appellant concedes that "defendants did not make payments punctually, and plaintiff for nearly two years indulged them in this and accepted payments from time to time of less than the whole amount due at the time of such payments." Plaintiff likewise concedes that such conduct operated as a waiver of that clause of the agreement making time the essence thereof, and created "such a temporary suspension of the right of forfeiture as could only be restored by giving definite and specific notice of an intention to enforce it." (*Stevinson v. Joy*, 164 Cal. 279, 285, [128 Pac. 751]; *Myers*

v. *Williams*, 173 Cal. 301, 304, [159 Pac. 982]; *Burmester v. Horn*, 35 Cal. App. 549, 552, [170 Pac. 674]; *Boone v. Templeman*, 158 Cal. 290, 297, [139 Am. St. Rep. 126, 110 Pac. 947].) Plaintiff, however, insists that such notice was given to defendants and that the provision making time the essence of the contract was thereby revived. Defendants deny the receipt of such notice and contend that the contract was still in force March 20, 1916, when plaintiff refused to accept the amount due thereunder. [2] The trial court found that the "plaintiff corporation has never given notice of cancellation or avoidance of said contract." Having conceded the waiver of the right of forfeiture, the burden was on the appellant to show a revival of the terms of the contract by proof of a definite and specific notice of the intention to enforce it. As to this the evidence was evasive, indefinite, and conflicting, and the trial court was justified in making the finding above noted.

[3] A finding on this issue alone, taken with the concessions of appellant, is sufficient to support the judgment. Having thus waived the right of forfeiture and failed to prove the revival of that right, the failure of the court to find on other issues becomes immaterial on this appeal. (*Hertel v. Emireck* 178 Cal. 534, [174 Pac. 30]; *Smith v. Smith*, 173 Cal. 725, [161 Pac. 495].) A finding favorable to appellant on each of these issues would not support a judgment in its favor in view of the general finding of want of notice.

The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 3031. First Appellate District, Division Two.—September 15, 1919.]

HERBERT EADES, a Minor, etc., Respondent, v. LOS ANGELES RAILWAY CORPORATION (a Corporation), et al., Defendants; LOS ANGELES RAILWAY CORPORATION (a Corporation), Appellant.

- [1] **COSTS—ITEMS FOR TAKING DEPOSITIONS.**—Items for taking depositions are proper disbursements to put into a cost bill unless they are unnecessary or for some special reason should not be allowed.
- [2] **ID.—DEPOSITION OF PLAINTIFF—PROPER ITEM UPON COST BILL.**—The expense of taking the deposition of the plaintiff is a proper item upon the cost bill and should be allowed where the taking of the deposition was regular in all particulars, as provided by the Code of Civil Procedure, and there is no denial of the allegation in the affidavit that this deposition was necessary for the trial of the action.
- [3] **ID.—DEPOSITION TAKEN WITHOUT NOTICE—EXPENSE NOT ALLOWABLE.**—A deposition of one of the defendants taken upon stipulation of counsel for the different defendants is not admissible in evidence against the plaintiff where the latter was given no notice of the taking of such deposition and he was not represented at the taking thereof; and the plaintiff may not be charged with the expense of taking such deposition as costs.

APPEAL from an order of the Superior Court of Los Angeles County taxing costs. Grant Jackson, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

Gibson, Dunn & Crutcher and Norman S. Sterry for Appellant.

E. B. Drake for Respondent.

LANGDON, P. J.—This is an appeal from an order of the superior court made after judgment in favor of the defendant Los Angeles Railway Corporation, the appellant here, which order granted the motion of plaintiff to tax costs and struck from the cost bill of said defendant an item of \$8.50 for the taking and transcribing of the deposition of plaintiff, and an item of \$17 for the taking and transcribing of the deposi-

tion of F. C. Funk, one of the defendants. The motion to tax costs was made upon the grounds that the items were not taxable under the law and that the deposition of F. C. Funk was taken without the notice or knowledge of the plaintiff. Upon the hearing of the motion the parties stipulated as to all material facts, from which stipulation it appears that the deposition of plaintiff was taken by the defendant and appellant under and by virtue of the provisions of subdivision 1 of section 2021 of the Code of Civil Procedure, said deposition having been taken upon stipulation of all of the parties to the said action. It also appears that the deposition of F. C. Funk was taken upon a stipulation entered into between counsel for defendant Funk and counsel for defendant Los Angeles Railway Corporation, the appellant, but that the counsel for plaintiff did not sign said stipulation and had no notice of the taking of said deposition, and plaintiff was not represented at the taking thereof.

In addition to the stipulations regarding these facts, upon the hearing of said motion, the appellant filed an affidavit of its counsel to the effect that both depositions were necessary to the preparation and trial of its case. No evidence was offered by the plaintiff to contradict this affidavit, and the motion to tax costs was not made upon the ground that the depositions were not necessary.

[1] It is stated to be the rule that items for taking depositions are proper disbursements to put into a cost bill unless they are unnecessary or for some special reason should not be allowed. (*Lindy v. McChesney*, 141 Cal. 351, 353, [74 Pac. 1034]; *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 745, [91 Pac. 593].) [2] The taking of the deposition of the plaintiff, being regular in all particulars, as provided by the Code of Civil Procedure, and there being no contradiction of the allegations in the affidavit that this deposition was necessary for the trial of the action, the expense of taking the same was a proper item upon the cost bill and should have been allowed.

[3] As to the expense of the deposition of the defendant Funk, we think the action of the trial court was proper. It is true that section 2021 of the Code of Civil Procedure provides for the taking of a deposition of a party to an action. However, section 2031 of the Code of Civil Procedure, provides how such deposition may be taken "on serving upon the

adverse party previous notice of the time and place of examination," together with a copy of an affidavit showing that the case is within the provisions of section 2021, Section 2032 of the Code of Civil Procedure provides that when a deposition is regularly taken in the manner provided therein, it may be used by either party upon the trial or other proceeding *against any party giving or receiving the notice*. It being admitted that no notice was given to the plaintiff of the taking of this deposition, such deposition was not entitled to be admitted in evidence as against him. It is stated in the affidavit of the appellant that at the trial the plaintiff objected to the introduction of the deposition upon this ground. As this deposition was not regularly taken so as to make it admissible in evidence against the plaintiff, it would seem to follow that plaintiff may not be charged with it as costs.

The order appealed from is modified by allowing the item of \$8.50, the expense of taking the deposition of plaintiff, thus increasing the amount of costs allowed to appellant from \$47.70 to \$56.20. As modified, the order appealed from is affirmed, the appellant to pay its own costs.

Brittain, J., and Nourse, J., concurred.

[Civ. No. 2012. Third Appellate District.—September 15, 1919.]

WILLIAM H. PRATT, as Administrator, etc., Appellant, v.
JENNIE S. PRATT, as Administratrix, etc., Respondent.

- [1] ESTATES OF DECEASED PERSONS — ACTION AGAINST REPRESENTATIVE OF ESTATE OF DECEASED ADMINISTRATOR — PERFORMANCE OF OFFICIAL DUTY—PRESUMPTION.—In this action against the representative of the estate of a deceased administrator for moneys collected by the latter as such administrator and alleged not to have been accounted for, it must be presumed, in view of the absence of positive evidence to the contrary and the lapse of the great number of years, that the deceased administrator performed his official duty, that he acted honestly and in good faith, and that if any money was due, it was paid. Such presumption is not affected by the provisions of the statute in relation to the administration of estates.

- [2] **ID.—RIGHT OF ADMINISTRATOR TO SETTLE WITH SOLE HEIR WITHOUT ADMINISTRATION.**—Where there was no real estate, no creditors, and no controversy as to the heirs, the father of the deceased, between whom and the administrator a relation of trust and confidence existed, being the sole heir, it cannot be said that it was the duty of the administrator in any event to pursue the course indicated by sections 1443, 1622, 1636, and 1665 of the Code of Civil Procedure. While that would have been the more regular procedure, and would have afforded him greater security, there was nothing unreasonable or illegal in his settling with his father without the formality of the ordinary administration of estates, his determination being subject to review by the court at the instance of any interested party.
- [3] **ID.—LACHES—WHAT CONSTITUTES—LAPSE OF TIME.**—Laches, unlike the statute of limitations, is not a mere matter of time. It involves and implies some other circumstance or circumstances that would render inequitable the enforcement of the claim, such as a change in the relation of the parties or the condition of the property that is deemed a justification for the denial of any relief. The great lapse of time, especially if the claimant has knowledge of the existence of his right, however, is often held sufficient to create the presumption or implication of another fact of an equitable nature, and thus to justify a decision against the claimant.
- [4] **ID.—RIGHT OF HEIR TO COMPEL SETTLEMENT OF ESTATE.**—An heir has the right to invoke the aid of the court to compel the administrator to settle the estate within the statutory time.
- [5] **ID.—EVIDENCE—INSTRUMENT ACKNOWLEDGED OUTSIDE STATE—SUFFICIENCY OF OBJECTION TO.**—An objection to the admission in evidence of a power of attorney executed in England on the ground that it was not properly acknowledged must be specific in order to put the person offering it on proof of its proper acknowledgment. An objection to its admission on the ground that it was not acknowledged as required by the laws of this state is not sufficient.
- [6] **ID.—PAYMENT OF CLAIM—DEATH OF WITNESSES—EFFECT OF LAPSE OF TIME—EVIDENCE—FINDING.**—The facts that the only parties who could have positive knowledge of the payment or nonpayment of the money from the administrator to the father were dead, and that but slight evidence with reference thereto was offered on both sides, justified the trial court in its conclusion that owing to the great lapse of time evidence could not be secured as to the payment or nonpayment of the claim.
- [7] **ID.—LACHES—DISCRETION OF TRIAL JUDGE.**—There is no hard-and-fast rule as to the length of time that would bar such an action as this. Much depends upon the peculiar circumstances of the

case, a large discretion being confided to the trial judge, and the disposition of an appellate court is and should be to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done.

APPEAL from a judgment of the Superior Court of Stanislaus County. L. W. Fulkerth, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hawkins & Hawkins for Appellant.

J. M. Walthall for Respondent.

BURNETT, J.—George Pratt died on the twelfth day of June, 1876. On the first day of July following, his brother, Samuel Pratt was appointed the administrator of his estate by the probate court of the county of Stanislaus. Samuel Pratt thereupon qualified as such administrator and immediately collected from two certain banks the sum of \$850, which the said George Pratt, deceased, had deposited therein, but he took no further steps in the administration of, nor did he account to, said estate for the moneys he received. On the fourteenth day of January, 1915, the said Samuel Pratt died and on the fifth day of February, 1915, letters of administration of his estate were issued to respondent. On the twenty-fifth day of October, 1915, plaintiff was appointed administrator of the estate of said George Pratt, deceased, and he thereupon presented a claim against the estate of Samuel Pratt in favor of the estate of George Pratt for said money, with compound interest, the total amount of the claim being over eleven thousand dollars. It was rejected by the said administratrix and suit was immediately brought thereon. The said George Pratt left as his sole heir at law, his father, Samuel Pratt, Sr., who was and always remained a resident of England. He also left several brothers and sisters in that country and one brother, the plaintiff herein, who, after the death of George, the exact time not being shown, came to California. There is no positive evidence that said Samuel Pratt ever made any accounting or paid any money to his father, the only showing as to any money transactions between him and the other members of the family consisting of

his sending a few small sums of money to his sisters in 1913 and 1914.

The grounds for the trial court's judgment in favor of the defendant are disclosed by the following findings: "The court finds that the said Samuel Pratt collected certain sums of money belonging to the estate of George Pratt, deceased, to wit, said sum of \$850, that he never accounted to the said estate therefor, but that he received and held a power of attorney from his father, Samuel Pratt, Sr., who was the sole heir of said George Pratt, deceased, to collect said money and pay the same to his father, and the court finds that the presumption is that said Samuel Pratt accounted to said father for said money collected, and from said presumption the court finds that said money was paid by Samuel Pratt to his father, Samuel Pratt, Sr.; that the said Samuel Pratt, Sr., deceased, did not die for twenty-three years after the death of said George Pratt, deceased, and that during said time had knowledge of the death of said George Pratt, deceased, and the appointment of said Samuel Pratt as administrator of his estate during all of said years; that almost immediately after the death of said George Pratt, deceased, the said father executed and forwarded to the said Samuel Pratt said power of attorney; that during no time during said time of said thirty-eight years did said plaintiff make any demand upon said Samuel Pratt for an accounting as administrator of the estate of George Pratt, deceased; that no demand was made upon said Samuel Pratt for an account as such administrator during his lifetime. That there is on file in the estate of said George Pratt, deceased, no demand or request for an accounting by the said plaintiff, or anyone else, filed during the lifetime of said Samuel Pratt.

"That after the said letters were issued to the said Samuel Pratt, he took no further steps to settle said estate, and that no further steps have been taken in said estate and that none were taken any time prior to the fourteenth day of January 1915, at which date the said Samuel Pratt died, and that no inventory and appraisal were ever filed in said estate from the time of the appointment of the said Samuel Pratt as such administrator until his death and that no claims have been filed against said estate.

"That the evidence is insufficient to show that no money out of the money of said estate of George Pratt, deceased, was

paid out for sickness or burial; that evidence cannot be obtained by reason of the long lapse of time between the death of said George Pratt, deceased, and the institution of this action to establish any allegation in the pleadings, for the reason that the said Samuel Pratt, the person having full knowledge of the matters, and all other persons from whom information can be had, are dead; that the evidence is insufficient to establish what disposition was made of any moneys or property belonging to said estate of George Pratt, deceased, which might have or did come into the hands of said Samuel Pratt as administrator of said estate; that the evidence is insufficient on account of the great lapse of time since the death of said George Pratt, deceased, and the appointment of Samuel Pratt as his administrator, and the death of all those possessed of the knowledge of such fact, to establish the allegation in the complaint that the money alleged to have been collected by said Samuel Pratt for or on account of the estate of George Pratt, deceased, was never paid to any of the heirs of the said George Pratt, nor expended for the benefit of the estate of George Pratt, nor paid to any other person in interest for the estate of George Pratt or otherwise, or that it was never paid out to anyone else, or that it was used for the benefit of said Samuel Pratt.

"The court, therefore, finds from the foregoing facts, that said Samuel Pratt accounted to and paid over to said Samuel Pratt, Sr., the father of said George Pratt, deceased and the sole heir of said George Pratt, deceased, all sums of money to which he, the said Samuel Pratt, Sr., would have become entitled to, or was entitled to from said estate."

As conclusions of law the court made the additional findings: "That said action is barred on account of the laches of the plaintiff, and each and all of the heirs of Samuel Pratt, Sr., in demanding an accounting of the said Samuel Pratt as administrator of the estate of George Pratt, deceased.

"That the said claim of the plaintiff as administrator of the estate of George Pratt, deceased, against the estate of Samuel Pratt, deceased, is a stale claim and not enforceable against the estate of Samuel Pratt, deceased.

"That on account of the great lapse of time since the appointment of said Samuel Pratt as administrator of the estate of George Pratt, deceased, the said Samuel Pratt is presumed

to have duly accounted to the heirs of said George Pratt and to have paid their distributive shares in said estate."

It thus appears that four considerations entered into the decision of the lower court, namely, the failure of proof on the part of plaintiff, the presumption of payment by Samuel Pratt to his father, the staleness of the claim and the laches of said plaintiff and the other heirs of Samuel Pratt, Sr.

As to the first, it may be said that the record herein furnishes a striking demonstration of the difficulty of proving a fact after the lapse of so many years. And in considering this phase of the case, it must be deemed a fair inference that the parties presented all the evidence that was available. We cannot say that there is an entire absence of evidence of the failure of Samuel Pratt to properly account with his father. However, it is meager, and, in view of the exclusive province of the trial judge, acting in place of a jury to determine the probative force of the testimony, we think no appellate court would be justified in holding that a fair consideration of the evidence should have led the lower court necessarily to the conclusion that Samuel Pratt had not paid his father all that the latter was entitled to. In regarding the point we must remember that, while it was shown, and the court found that Samuel Pratt had collected \$850, there is no evidence whatsoever as to the expense of the last illness of George Pratt or of his funeral, or of the administrator's, or the attorney's fee in the administration of the estate. Respondent claims \$350 to be a reasonable amount for these items. Ordinarily, such expenses would be equal to that amount. Of course, it is impossible to say positively how much, if anything, was paid out for any or all these matters, and in the absence of any evidence whatever as to this consideration, the trial court would necessarily be in doubt as to the amount left in the hands of Samuel Pratt to be paid over to his father.

But, assuming that the burden of proof was upon respondent to show how much, if anything, was paid for these purposes, and in the absence of any showing to that effect, the court was bound to charge the estate of Samuel Pratt, deceased, with the full amount, which was collected, the inquiry then arises, whether the evidence was such that the court should have found that it was not paid to Samuel Pratt, Sr.

The testimony on this point in behalf of appellant was brief and we may herein set it out. John Radley testified that he had known Samuel Pratt since 1875, that they were working together in June, 1876. "Samuel Pratt's brother, George Pratt, got hurt and Samuel Pratt got a message to come up, and he went. He returned the next day. He then told me that his brother was hurt very bad and he didn't think he would live very long. Samuel Pratt was running the header for Mr. Wardrobe and he said he came back to keep his job and he said that he had hired a man to take care of his brother. His brother soon hereafter died." After stating that Samuel told him that he collected over seven hundred dollars from the Stockton and Merced banks belonging to his brother, George, the witness proceeded: "I once asked him if he had sent the money to his father and he told me no, but he was going to. We had several conversations in regard to it. The last time I asked him about it he said he had put that money to interest so it would draw more money and he would send it later on to his father. He told me he knew where he could buy 160 acres of land and he asked my opinion. Afterward he bought the land." He also stated that Samuel Pratt never told him anything as to whether his father had made a demand for the money. Plaintiff offered in evidence a mortgage on certain lands in Stanislaus County, dated November 3, 1876, made by James Berry to Samuel Pratt to secure the sum of \$1,850 and a satisfaction thereof on October 24, 1879. A deed from one Emeline Daggett to Samuel Pratt reciting a consideration of one thousand dollars and dated October 12, 1878, was also introduced in evidence.

George Squire then testified: "I knew Samuel Pratt for ten years, from 1873 to 1883. He told me that George Pratt asked him to collect certain moneys, \$950 or \$960, and send it to his father. The money was in the savings bank at Stockton and Merced. What I know about the matter was what I learned from being his nearest neighbor and what he told me himself. I know he had the money. He bought with it three quarter-sections of the town of Oakdale. One of the quarters was purchased from me."

The trial court might well hesitate to find from the foregoing that Samuel Pratt violated his trust and withheld from his father any money to which he was entitled. The incidents concerning which the witnesses testified were held in the un-

certain grasp of memory reaching back nearly forty years, and this circumstance was, of course, significant in the determination of their credibility. That after such a period of time they could state with accuracy what was said and done concerning a matter in which they had no personal interest, might well challenge credulity. It is well to remember in this connection that the substitution or elimination of a single word of the conversation, or the addition of a slight incident, might present the consideration in an entirely erroneous light. Moreover, it is admitted that Samuel Pratt did not conceal from these witnesses the fact that he had money in his possession belonging to his father and he expressed his intention of sending it to him. This, at least, tends in some degree under the circumstances to negative the theory of a dishonest purpose. In fact, the only incident detailed by the witnesses lending any support to the claim that Samuel Pratt failed to settle with his father was the purchase of land to which they testified. But as to this, in the first place, it may be said, there is nothing to show that he did not have money of his own. That he had some is quite apparent, indeed, from the amount invested. That he also purchased the land with his own money would be presumed, were it not for the said testimony of George Squire that Samuel Pratt "bought with the money three quarter-sections in the town of Oakdale." But this testimony is quite unsatisfactory in the absence of any further explanation and it is more significant for its omissions than for what was stated. When the land was bought does not appear, the deed not being offered in evidence, nor how much was paid for it, nor how long it was retained by Samuel Pratt. Furthermore, the statement of the witness undoubtedly involved his mere opinion from what was told him by said Pratt and his neighbors. Again, his credibility was for the trial judge and we cannot say that he was not justified in attaching little, if any, importance to this testimony.

[1] But according it full credit, would the lower court be required to find from this circumstance that the money was not paid to Samuel Pratt, Sr.? We think not. A more just and reasonable inference would be that the son was moved by an honest and filial purpose to increase his father's possessions, that he was successful in his endeavor, and that in due time he transferred the money with its increase to its rightful

owner. We repeat, the record contains some evidence, though slight, as we view it, of the dereliction of Samuel Pratt, Jr., in the premises, but not of sufficient probative force for us to hold that the lower court was bound to find that there was no payment. How would the case then stand, and, particularly, what presumption should be indulged? Clearly, we think, that Samuel Pratt, Jr., performed his official duty and that he acted honestly and in good faith. A contrary presumption would impute to him not only a violation of the obligations of his trust, but an utter indifference to the compelling impulses that usually characterize such relation of kinship, and, more than that, the actual commission of a crime. This is not to be permitted, especially in view of the great number of years that had elapsed. The whole record, we are persuaded, justifies the presumption and the conclusion that, if any money was due, it was paid.

Many cases of similar import are found in the books and some of them determine that the presumption of settlement should be indulged where it is not overcome by satisfactory evidence to the contrary. In *Jones v. Jones*, 91 Ind. 378, the right to a settlement had existed for about twenty years and the court said: "This was a stale demand. In the absence of evidence to the contrary, the presumption would be it had been paid. Even in cases of chancery jurisdiction, to which the statute of limitation is not a bar, a court of equity will presume that a stale demand has been paid. (*Parker v. Ash*, 1 Vern. 256; *Sturt v. Mellish*, 2 Atk. 610; *Higgins v. Crawford*, 2 Ves. Jr. 571; *Smith v. Calloway*, 7 Blackf. (Ind.) 86; *Stehman v. Crull*, 26 Ind. 436.)"

Nor do we think this presumption is affected by the provisions of the statute in relation to the administration of estates. It is true that the Code of Civil Procedure provides that an administrator must make and return to the court a true inventory and appraisement of the estate (sec. 1443); when required by the court or upon application of any person interested, he must render an account (sec. 1622); upon the hearing of the accounts, the heirs may contest all matters included therein (sec. 1636); and final distribution of the estate can be had only upon final settlement of the accounts of the administrator, at which time the court ascertains who are the persons entitled to the estate (sec. 1665).

[2] In view of the failure of Samuel Pratt, Jr., to comply with these various provisions of the statute it is contended that he had no right or authority to pay out any money to his father, and, hence, the presumption would be that he acted accordingly. But it must be remembered that the only parties interested in the regularity of the proceedings are the administrator himself, the creditors and the heirs, and each case must be considered in the light of its own peculiar facts. Herein there was no real estate and we must take it for granted that there were no creditors, unless, perhaps, on account of the last illness and funeral expenses of the brother; that there was no controversy as to the heirs; that a relation of trust and confidence existed between the administrator and his father; that the son believed, and had reason to believe, that no question would ever arise as to the integrity of his conduct; that he knew how much his father was entitled to, and believed that he could, with safety, settle with him without incurring any further expenses of administration.

It can hardly be said that it was his duty in any event to pursue the course indicated by said provisions of the code. That would have been the more regular procedure, and it would have afforded him greater security, but if the facts existed as we have supposed, there was nothing unreasonable or illegal in his settling with his father without the formality of the ordinary administration of estates, and we deem it not improbable that he followed the shorter way. His determination was, of course, subject to review by the court at the instance of any interested party, but we must suppose that he felt amply protected and that the heir was satisfied.

In the *Estate of Willey*, 140 Cal. 238, [73 Pac. 998], the executors, in an account rendered by them, sought to have themselves credited with certain advance payments made by them to certain beneficiaries named in the will, without obtaining an order of court, and it was held that the trial court properly retired those items from the account to be considered when the petition for distribution was heard. Therein was involved the construction of the terms of a will, and a controversy existed between the interested parties, which the court was called upon to review in the regular course of the administration of the estate. The executors could not by their action preclude the court from determining the controversy at the proper time and, manifestly, as it was stated:

“When an executor undertakes to construe the provisions of a will or to make payments thereunder in anticipation of the decree of distribution he does so at his peril.” While the facts herein distinguished this case from that, still it may be conceded that, if said Samuel Pratt made a settlement with his father without an order of court, he did so “at his peril,” and that he could not thereby forestall an accounting in court, yet under the circumstances of this case we deem it not an unreasonable inference that he did make such settlement, believing that he was justified in so doing, and we think it cannot be said that thereby he violated his duty or transgressed any provision of the law.

The findings as to the staleness of the claim and the laches of plaintiff may be considered together, as they are closely related. [3] Appellant is clearly right in the contention that laches, unlike the statute of limitations, is not a mere matter of time. It involves and implies some other circumstance or circumstances that would render inequitable the enforcement of the claim. This may be a change in the relations of the parties or the condition of the property that is deemed a justification for the denial of any relief. It may be added, though, that the great lapse of time, especially if the claimant has knowledge of the existence of his right, is often held sufficient to create the presumption or implication of another fact of an equitable nature, and thus to justify a decision against the claimant. As to the character of this defense and the reasons for its recognition and enforcement, it is sufficient to refer to the carefully considered opinion written by Justice Hart and adopted by the supreme court in the case of *Miller v. Ash*, 156 Cal. 544, [105 Pac. 600].

To illustrate, however, the peculiar views of various courts concerning situations similar to the one before us, we may cite some instances of the application of the doctrine of “staleness” and “laches.”

In *Perkins v. Cartmell*, 4 Harr. (Del.) 270, [42 Am. Dec. 753], a legacy was involved for which no demand had been made for thirty years and the court said: “This suit is barred by lapse of time independently of the statute of limitations, upon the presumption of payment and satisfaction, which presumption is not rebutted. The defense founded upon mere lapse of time and the staleness of the claim, in cases where no statute of limitation directly governs the case,

is said by Judge Story (2 Com. on Eq. Jur., sec. 1520, p. 904), to be a defense peculiar to courts of equity. Upon general principles of their own, independently of the statutes of limitation, they have always discountenanced laches and neglect; and refused their aid to stale demands where the party has slept upon his right, or acquiesced for a great length of time. After a considerable lapse of time, they refuse to interfere, from considerations of public policy, and the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost."

There was something like twenty years' delay in demanding an accounting in the case of *Osborne v. O'Reilly*, 43 N. J. Eq. 647, [12 Atl. 377], and the court said: "This great delay might have justified the court in dismissing the complainant's bill without looking at the merits. It certainly requires of the court to take care that the dangers of injustice, which always attend the investigation of facts long since transpired are not overlooked, and that before disturbing the status acquiesced in by both parties for so many years very convincing evidence of the propriety of a change shall be adduced."

In *Le Roy v. Bayard*, 3 Bradf. Sur. (N. Y.) 228, it was held that the lapse of twenty-nine years since the administration of the estate commenced is sufficient to excuse a formal inventory and account.

In *Calhoune's Appeal*, 39 Pa. St. 218, the court determined that since the devisee and her heirs knew for twenty-five years of the mismanagement of the estate but required no accounting nor sought any relief they were not entitled to the aid of a court of equity, after having so slept on their rights, the court saying, however: "Had there been ignorance of facts or legal disabilities to account for the extraordinary neglect of legal remedies on the part of the appellants, their inaction might have been excused, but nothing is shown or suggested by way of excuse."

In *Gatewood v. Gatewood's Adm.* (Ky.), 70 S. W. 284, ten years after the death of an administrator suit was brought against his estate for a sum claimed to have been retained by him belonging to plaintiff, the claim being thirty years old, and it was held that the claim was stale and not enforceable in equity.

In *Hill v. Hill*, 70 N. J. Eq. 107, [62 Atl. 385], the court of chancery held that the lapse of seventeen years was sufficient to bar an application for an accounting of an administrator. The court declared that the complainants were "chargeable with notice that they were entitled to a prompt accounting, which is precisely the remedy which they are here asking. Not only do they not allege their ignorance in these matters, but it is quite impossible to believe that they were so far indifferent to their pecuniary rights as not to be informed that the time had arrived when they were entitled to receive from their father's estate more than they did actually receive unless the same was absorbed in the payment of debts. The complainants, then, are chargeable with resting on their rights for about seventeen years without the least excuse whatever. In the meantime it is fair, I think, to infer that the vouchers and papers relating to the estate, which must have been in the hands of their uncle, John, have been lost or mislaid, and are not now available to the answering defendant."

In *Re Henry's Estate*, 198 Pa. 382, [48 Atl. 274], it was held that an application for an accounting of an administrator was barred by the lapse of eighteen years, the court saying that the case was "made much stronger by reason of the death of the person whose liability to account is now asserted." Therein the court cites with approval the case of *Gress' Appeal*, 14 Pa. St. 463, wherein an account was refused after the lapse of eighteen years "not because of either presumption of payment or settlement, but because it resulted altogether from the unwarrantable negligence of the party to call for an account without offering any sufficient reason accounting for the delay."

In *Phillips v. Piney Coal Co.*, 53 W. Va. 543, [97 Am. St. Rep. 1040, 44 S. E. 774], a delay of ten years was held sufficient to bar an action to reform a deed, and the court declared that a party who seeks to avoid the charge of laches in such case "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing without inquiring

whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In *Preston v. Preston*, 95 U. S. 200, [24 L. Ed. 494, see, also, Rose's U. S. Notes], the suit was brought twenty-five years after the right accrued and the court said: "The delay of one to this extent in prosecuting his rights under a contract is, except under special circumstances not existing here, such laches as disentitled him to the aid of a court of equity."

In *Pusey v. Gardner*, 21 W. Va. 469, it was held that a court of equity will not set aside a deed, made by a daughter to her father immediately before her marriage, conveying her remainder in land, in which the father had a life estate, upon the ground of undue influence after an interval of thirty-five years and after the death of the father, though the claim of the daughter is not barred by the statute of limitations, where the case is not a clear one and there are no circumstances which sufficiently account for the delay. Therein was quoted the following statement from Kerr on Fraud and Mistake, section 305: "Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver."

Other cases to the same effect are available, but they need not be cited.

Appellant finds comfort in certain other decisions, which he claims to be essentially in conflict with the cases upon which respondent relies. But it can hardly be said that they teach another doctrine, although some of them present a different view of the burden of proof. One of them is the carefully considered case of *Depue v. Miller*, 65 W. Va. 120, [23 L. R. A. (N. S.) 775, 64 S. E. 740], wherein the West Virginia supreme court of appeals declared it to be a sound doctrine that "mere forbearance to compel rendition of a just debt or other right, *the existence of which is clear beyond doubt*, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay; but if the length of time be long enough in itself, or with the aid of circumstances and conduct to satisfy the chancellor that the plaintiff had abandoned his right before he brought suit to enforce it, his demand will be regarded as stale and lost by laches." However, the court held that the claim therein was *fully proven by documentary evidence* under circum-

stances not in any way operating to the prejudice of the defendants and tending to negative the inference of intent on the part of plaintiff to abandon or relinquish his right, and concluded that the delay in the assertion of the right for a period of less than twenty years would not bar relief.

In *Glen v. Kimbrough*, 58 N. C. 173, the action was held not to be barred by the lapse of thirty-four years, but the decision was based upon the ground that there was no representative of the estate against which the action could be brought. The court, however, recognized the rule to be that after the lapse of a long period of time a presumption will arise "of payment or satisfaction or abandonment; but this presumption is one of fact, and is rebuttable, and where it appears it has not been settled, or where it appears there was no one with the legal power to make a settlement, the presumption is rebutted."

In the *Estate of Fischer*, 189 Pa. St. 179, [42 Atl. 8], the main question was as to the validity of a certain release, and it was justly held that the lapse of seventeen years did not bar the claimant from seeking to avoid the effect of said release on the ground that she imperfectly understood English, did not comprehend the meaning of the terms employed, and was induced to execute it by reason of certain threats which were made. It was in view of these circumstances that the court said: "There is nothing, therefore, left to sustain the plea of laches but mere lapse of time; and that is clearly insufficient."

In *Wilson v. McCarty*, 55 Md. 277, it was held that the orphan's court had jurisdiction to compel a surviving executor to return assets of the estate or recover them where they could be recovered even where an account called final had been allowed and some fourteen years had elapsed since such account. The court said this could be done within a reasonable time, and "what is reasonable time depends upon the peculiar circumstances of each case, and the character of the correction to be made."

In *Werborn v. Austin*, 82 Ala. 498, [8 South. 280], the court recognized the presumption of payment from the lapse of twenty years in the case of a trust but held that it was overcome by evidence to the contrary.

In *Branch v. Hanrick*, 70 Tex. 731, [8 S. W. 539], suit was brought August 11, 1885, against one who had been appointed

administrator of an estate in 1867. The action was by one claiming a distributive share of the estate, who sought to compel an accounting by the administrator. The latter contended that by virtue of a certain statute of Texas, the administration of the estate was conclusively presumed to have been closed, but the supreme court held that said statute had been repealed and that it was proper to show that such settlement had not been made.

The important question in *Re Sanderson*, 74 Cal. 199, [15 Pac. 753], was whether the executor had been negligent as to the collection of a certain note, he having made no excuse for his failure. The matter was covered by section 1615 of the Code of Civil Procedure, providing that "no executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault." The supreme court properly held that the statute of limitations did not run against the continuing trust of the executor, and that in case the debt was not collected, the statute imposed upon him the burden of showing that it was without his fault.

In *Bremmerly v. Woodward*, 124 Cal. 568, [57 Pac. 561], the action was brought for an accounting about eleven years after the last account had been rendered. It is plain, though, that no final accounting could have been enforced against Woodward during the disability of the minors, the will containing this provision: "Whenever one of my children comes of age or shall be entitled to his or her share of the estate then remaining in the hands of my executors, and they are hereby directed and authorized to deliver up such child's portion by a fair division made of the land belonging to the estate." It seems that the youngest minor reached his majority only about one year before the suit was brought. So, the case is hardly in point here. It is true that the court said: "To show an honest execution of the trust it was incumbent upon Woodward to show what he did with the moneys. In the absence of such showing I think we must conclude that he did not use them for the estate." That was a proper rule to apply under the peculiar circumstances of the case. Besides, the evidence and pleadings of the parties were such that the lower court could hardly have concluded otherwise than in favor of plaintiff, the serious question on appeal being as to the sufficiency of the finding of Wood-

ward's neglect to invest the trust money and as to the amount of interest that should be charged against him.

But appellant claims that the lower court without warrant assumed or found certain circumstances to exist which are essential to the support of the conclusion that plaintiff and the other heirs were chargeable with laches. One of these, namely, in relation to the fact that no inventory was filed nor other step taken in the administration of the estate, we have already noticed. [4] We may add that it was undoubtedly the right of the heir to invoke the aid of the court to compel the administrator to settle the estate within the statutory time.

Again, it is claimed that the evidence does not show that the heirs had knowledge of the death of George Pratt and of the condition of his estate. The only heir, as we have seen, for twenty-three years was his father, and power of attorney from him to Samuel Pratt, Jr., dated July 11, 1876, was received in evidence in which he referred to "my late son George Pratt, deceased." [5] It is true that an objection was made by appellant to the introduction of this instrument on the ground that "the deed and certificate is not in conformity with our statute and that the execution is insufficient, and that the acknowledgment is not in the form required to prove the signature of a signer to a document, and that it is not duly authenticated as required by the laws of the state of California, and it does not show that it has ever been acted upon as genuine and its custody has not been explained and it does not appear that it has ever been treated as a genuine document." The power of attorney purported to be executed in England and acknowledged before Cad. E. Palmer, a notary public of Barnstaple, in the county of Devon, and had the seal of his office attached. This notary certified that Samuel Pratt appeared before him "and acknowledged the said letter of attorney to be his act." To this with the seal of his office was annexed the certificate of the United States consul at Bristol, England, "that the foregoing signature and seal are the true and genuine signature and seal of Cadwaloder Edwards Palmer, a notary public, residing at Barnstaple, in the county of Devon, England." Section 1189 of our Civil Code specifies the general form of the certificate of acknowledgment, but adds: "Provided, however, that any acknowledgment taken without this state in accordance with

the laws of the place where the acknowledgment is made, shall be sufficient in this state; and provided further, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be *prima facie* evidence of the facts stated in the certificate of said clerk." Since the instrument was executed in England, it was, therefore, necessary that it be acknowledged according to the law of that country. But if it was not so acknowledged, or there was any claim to that effect, such specific objection should have been made. The only objection in that respect was that it was not acknowledged as required by the laws of this state. We may add that the certificate contemplated by said *proviso* is not required to be attached to the acknowledgment. If attached, it affords *prima facie* evidence of the proper acknowledgment of the instrument, but, in its absence, other evidence of compliance with the requirement of the foreign law may be offered as provided by sections 1901 or 1902 of the Code of Civil Procedure. Appellant should have made the specific objection to put the respondent to such proof.

But, regardless of this instrument, it is not to be supposed that the father for over twenty years was ignorant of the death of his son. The presumption that "things have happened according to the ordinary habits of life" would justify the inference that he made inquiry and ascertained from his son, Samuel, that George had passed away. As to William, the plaintiff, the evidence shows that he lived for some years in the county of Stanislaus, wherein the latter was appointed administrator of the estate of his brother, George, and it would be quite unreasonable to assume that he was ignorant of the situation. If he had not known of the death of George or of the father, of course, he would have so testified when he was on the stand. The fact that he was not interrogated concerning it is quite sufficient under the peculiar circumstances of the case to lead to the conclusion that he had such knowledge. We may add that his failure to excuse his delay of fifteen years after the death of his father and nearly

a year after the death of his brother, Samuel, before instituting this action is equally significant.

[6] It is also claimed that there is no sufficient support for the finding that owing to the great lapse of time evidence could not be secured as to the payment or nonpayment of the claim. It is true that counsel on both sides seemed somewhat reluctant to question the witnesses, the examination having been apparently very brief; but the evidence showed without doubt that the only parties who could have positive knowledge of the fact were dead, and this, considered with the circumstance that such slight evidence was offered on both sides, would appear to justify the court's conclusion that the evidence was not available.

[7] Speaking generally, we think it must be said that there is no hard-and-fast rule as to the length of time that would bar such an action as this, that much depends upon the peculiar circumstances of the case; that a large discretion is confided to the trial judge, and the disposition of an appellate court is, and should be, to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done. When we recall all the circumstances to which we have adverted, we cannot say that the decision was wrong. The responsibility for determining the question rested with the court below, and we think we are bound by the findings. The judgment is, therefore, affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 3039. First Appellate District, Division Two.—September 16, 1919.]

MARCEL CARL, Respondent, v. D. McDOUGAL, as
Administrator, etc., Appellant.

[1] **CRIMINAL LAW — FORGERY—INTENT TO DEFRAUD ESSENTIAL ELEMENT.**—In criminal prosecutions for forgery, the intent to defraud is not only an essential element of the crime of forgery, but is an essential element of every indictment for forgery.

[2] SLANDER—CHARGE OF FORGERY—ACTION FOR DAMAGES—PLEADING.

The charge of forgery necessarily includes all the elements of the crime; therefore, in an action for damages for slander, it is sufficient to allege in the complaint that the defendant accused the plaintiff of having forged the former's name as the indorser of a certain check, without alleging that the slanderous words were used with the intention of charging that the plaintiff had forged the indorsement intending thereby to defraud.

[3] ID.—DEFINITION OF FORGERY—PROPER INSTRUCTION.—In such action the court did not commit error in defining to the jury the offense of forgery, it having previously properly instructed them that they must determine whether or not the defendant charged the plaintiff with the crime of forging his name to a check. If such a charge was made, it was slanderous.**[4] ID.—SUFFICIENCY OF PROOF.—**In such action, the charge of slander is sufficiently proved by testimony that the defendant, in speaking of the plaintiff, said to one person that "He forged a check on me," and to another that "He had a check which he forged his name to it." Slander is established if enough of the words alleged as constitute the sting of the charge and contain the poison to the character are substantially proved.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. F. Oster and Peyton H. Moore for Appellant.

W. C. Shelton for Respondent.

BRITTAIN, J.—In a suit against Theodore Wiesendanger the plaintiff, Marcel Carl, was awarded a verdict for three hundred dollars actual and seven hundred dollars punitive damages for slander. Wiesendanger appealed from the judgment entered upon the verdict. After the death of the appellant, upon suggestion, the administrator of his estate was substituted.

The complaint was in two counts, and in it the plaintiff in substance alleged the defendant had to two different persons, then the employers of the plaintiff, on the same day

2. Sufficiency of complaint in action for slander with respect to averments of publication and of time and place, note, *Ann. Cas.* 1918B, 504.

but at different times accused the plaintiff of having forged the defendant's name as the indorser of a certain check. The appellant makes six specifications of error, which may best be discussed in what appears to be their logical order. They are closely related and all refer to the allegation that the defendant said: "Mr. Carl is a forger. He has forged my name to a check and I have a lithographed copy of the check in my office."

[1] In criminal prosecutions for forgery, the intent to defraud is not only an essential element of the crime of forgery, but is an essential element to every indictment for forgery. (*People v. Turner*, 113 Cal. 278, [45 Pac. 331]; *People v. Smith*, 103 Cal. 563, [37 Pac. 516].) [2] In reliance upon this strict rule of criminal pleading, the appellant contends the complaint in the present case was fatally defective, in that it contained no allegation that the slanderous words were used with the intention of charging that the plaintiff had forged the indorsement intending thereby to defraud. If the words were slanderous, the intention with which they were used is immaterial, except, possibly, upon the question of exemplary damages. The rule relied upon by the appellant binds him. The charge of forgery necessarily includes all the elements of the crime. If the defendant accused the plaintiff of forgery or said the plaintiff had forged a check, he accused the plaintiff of a felony. It is not necessary that the language used should be chosen with the technical nicety required in an indictment. (*Mitchell v. Sharon*, 51 Fed. 424, 425.) Under the contention of the appellant none but those trained to observe the technicalities of criminal procedure would be able to slander their neighbors, and they would know how to limit their statements so they might do the wrong and avoid its consequences. Where one accuses another of having forged his name to a check, the language can mean nothing other than that the person accused has been guilty of a felony.

[3] The appellant contends the court erred in instructing the jury that in order to enable them to determine whether the language used by the defendant amounted to an accusation of the crime of forgery, he would define for their purposes the offense of forgery, and, in further instructing them that "Section 470 of the Penal Code provides in effect that every person who with intent to defraud signs the name of

another person or of a fictitious person, knowing that he has no authority so to do, to a check, commits a forgery." The appellant argues that there was no allegation in the complaint that the language used was to be construed in any other manner than according to its plain and literal meaning, and that it was the duty of the trial court to construe the language. This the court did in defining forgery. He had previously properly instructed the jury that they must determine whether or not the defendant charged the plaintiff with the crime of forging his name to a check. If such a charge was made, it was slanderous. (*Childers v. San Jose Mercury*, 105 Cal. 284, [45 Am. St. Rep. 40, 38 Pac. 903]; *Smullen v. Phillips*, 92 Cal. 408, [28 Pac. 442].)

[4] The appellant contends there was a fatal variance between the words alleged and those proved. Neither of the two witnesses to whom the statement was made testified that the defendant said, "Mr. Carl is a forger," but one testified the defendant said of Carl: "He forged a check on me," and the other, that the defendant said: "He had a check which he forged his name to it." The appellant relies on those cases which hold that in a civil suit for slander the plaintiff must prove the use of the slanderous words, and that it is unavailing that the jury imputes a slanderous meaning to other words. (*Fleet v. Tichenor*, 156 Cal. 343, [34 L. R. A. (N. S.) 323, 104 Pac. 458]; *Haub v. Friermuth*, 1 Cal. App. 556, [82 Pac. 571].) The rule is unquestionable and was properly applied in those cases. In the Fleet case the charge was that the defendant had said the plaintiff "stole" certain jewelry. The evidence was that the defendant said the plaintiff had "taken" the jewelry. The word "taken" does not imply the commission of a crime. The statement that a man has forged a check can imply nothing else. The appellant testified he had not made the statement. The jury believed the other witnesses. The statements of the plaintiff's witnesses were within the rule that slander is established if enough of the words alleged are substantially proved as constitute the sting of the charge and contain the poison to the character. (*Fleet v. Tichenor*, 156 Cal. 346, [34 L. R. A. (N. S.) 323, 104 Pac. 458]; *Smith v. Hollister*, 32 Vt. 708; *Lewis v. McDaniel*, 82 Mo. 577; *Merrill v. Peaslee*, 17 N. H. 540; *Zimmerman v. McMakin*, 22 S. C. 372, [53 Am. Rep. 7].).

The appellant claims the court erred in refusing to give two requested instructions and in giving another. His argument on those points is based upon the same grounds and the same rules and authorities which have been discussed. An examination of the record and all the instructions leads to the conclusion that the instructions given were fair to the defendant, complete and in accord with the law that in such actions enough of the words alleged must be proved to contain the sting of the charge and that all the words charged need not be proved.

The judgment is affirmed.

Langdon, P. J., and Nourse, J., concurred.

[Civ. No. 1896. Third Appellate District.—September 17, 1919.]

CATHERINE M. DE BOCK, Respondent, v. AUGUST DE BOCK et al., Appellants.

- [1] **APPEAL—ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEF.**—The legislature did not intend, by the enactment of section 953e of the Code of Civil Procedure, relating to the taking of appeals under the alternative method, that the appellant should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for a reversal, but only such portions of the record as he desires "to call to the attention of the court."
- [2] **ALIENATION OF AFFECTIONS—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.**—In an action for damages for the alienation of the affections of the former husband of the plaintiff, the complaint is sufficient where in very plain and direct language it charges the formation of a conspiracy by the defendants having for its object the alienation from the plaintiff of the affections of her former husband and thereby to deprive her of his protection, assistance, and consortium, that such conspiracy was actually executed or carried out by the defendants, and that by reason of the wrongful acts of the latter the plaintiff lost the love and

2. Action by wife for alienation of affections, notes, 6 Ann. Cas. 661; 14 Ann. Cas. 47; Ann. Cas. 1912C, 1179; Ann. Cas. 1916C, 748; 4 L. R. A. (N. S.) 613; 29 L. R. A. (N. S.) 842; L. R. A. 1916A, 67.

affection and the consortium of her said former husband, although, in addition thereto, it contains some matters which are wholly immaterial to, and have no necessary connection with, the cause of action pleaded and which might properly be stricken from the complaint on motion.

- [3] **ID.—CAUSE OF ESTRANGEMENT—CONTRADICTION OF MATTERS IN PREVIOUS ACTION FOR DIVORCE—ESTOPPEL.**—In such action the plaintiff is not estopped from denying certain facts alleged in her former complaint in a previous action against her husband for divorce with reference to the cause of the estrangement. The parties to the two actions are not the same, and the subject matter of the two actions is entirely and wholly different.
- [4] **ID.—EVIDENCE—FORMER DIVORCE COMPLAINT ADMISSION AGAINST INTEREST.**—In such action for damages for alienation of the affections of the former husband of the plaintiff, the complaint in the action for divorce previously brought by the plaintiff against the husband can perform no other office than that of evidence of an admission upon the part of the plaintiff that the material facts stated in such divorce complaint, which was verified, were true. It is not, of course, conclusive evidence of the truth of the facts so stated, and may be rebutted, but it constitutes an admission against interest which may, and should be, considered in the determination of the issues of fact in the subsequent action.
- [5] **ID.—JUDGMENT—SUFFICIENCY OF EVIDENCE.**—In this action for damages for alienation of the affections of the former husband of plaintiff, the evidence, which was entirely of circumstances, while not legally sufficient to justify a verdict against the defendant to whom such former husband had transferred his love and affection, was sufficient to warrant a verdict against the other defendants, who were relatives of such former husband.
- [6] **ID.—FEELINGS OF HUSBAND AND WIFE TOWARD EACH OTHER—EVIDENCE OF CONVERSATIONS ADMISSIBLE.**—In such action, evidence of conversations between the husband and wife is admissible to indicate their feelings toward each other.
- [7] **ID.—PROPER QUESTION—IMPROPER MATTERS IN ANSWER—REMEDY.** Where a proper question is put but the answer thereto contains matters which are not properly admissible, the proper and only remedy of the party aggrieved is to move to have such improper matter stricken out. A mere objection to such testimony is not sufficient to preserve the right of the objecting party to have the question raised reviewed on appeal.

3. Conspiracy to alienate affections, note, 3 L. R. A. (N. S.) 470.

4. Evidence in action for alienation of affections, notes, *Ann. Cas.* 1916C, 751; *Ann. Cas.* 1917D, 484; *Ann. Cas.* 1917E, 1020, 1029.

- [8] **ID.—OBJECTION TO TESTIMONY—FAILURE TO STRIKE OUT FULLY—WHEN NOT ERROR.**—Error of the court in failing to fully strike out all the testimony to which an objection was made can have resulted in no prejudice to the party making the objection where the same fact as shown by the testimony not stricken out was testified to by the witness without objection.
- [9] **ID.—REFUSAL OF RIGHT TO CROSS-EXAMINE PLAINTIFF—APPEAL—ERROR.**—It cannot be said on appeal that the trial court committed error in refusing the request of the defendants to cross-examine the plaintiff in reference to a conversation with her husband where the purpose or purport of the question to be asked was not made known to the trial court and the defendants did not ask the question of the witness directly that it might be made a proper subject of review.
- [10] **ID.—OBJECTIONS TO TESTIMONY BY TRIAL JUDGE.**—Except in unusual cases, the trial judge should not make an objection to a question asked and then sustain his own objection.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge. Reversed in part; affirmed in part.

The facts are stated in the opinion of the court.

Jay L. Henry and C. E. McLaughlin for Appellants.

P. H. Johnson and Irving D. Gibson for Respondent.

THE COURT.—We adopt the following portion of our opinion on the former hearing of this cause:

“The appeal is prosecuted by defendants, under the alternative method, from a judgment against them in the sum of five thousand dollars.

“It is stated in appellants’ opening brief that the action was brought ‘to recover damages from defendants, for enticing, inducing and persuading plaintiff’s husband to desert and abandon her,’ while respondent maintains that the cause of action is ‘for the alienation of the affections of Louis De Bock, husband of respondent.’

[1] “Preliminarily, respondent contends that this court is precluded from considering the points urged for reversal for the reason that appellants have failed to comply with the provision of section 953c of the Code of Civil Procedure, which provides that ‘the parties must, however, print in

their briefs or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.' The trial of this case occupied six days and the reporter's transcript contains 752 typewritten pages. Appellants' opening brief consists of 125 printed pages, practically one-half of which are devoted to a reproduction of the testimony which they claim is sufficient fairly and lucidly to present to this court the points upon which they rely, and we think their briefs sufficiently comply with the terms of the section to compel our consideration of the points raised on the appeal. That the legislature did not intend, by the enactment of said section, that the appellant in a case should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for a reversal, is indubitably shown by the use of the phrase 'such portions of the record.'

"The points first urged for a reversal by the appellants concern the complaint and the effect of certain allegations of the complaint in an action for divorce instituted by the plaintiff against Louis De Bock and determined prior to the time at which the present action was commenced, and they are: 1. That the complaint fails to state a cause of action; 2. That there is a variance between the facts alleged in the complaint in the divorce action and those set forth in the complaint in this action with respect to the cause or causes culminating in the separation of and estrangement between the plaintiff and her former spouse; that the plaintiff is concluded by the facts alleged in her divorce action and is, therefore, estopped from contradicting them in this action. In other words, the contention is that the plaintiff, having charged certain specified misconduct against her former husband in her divorce complaint, is conclusively bound by the averments so made, and, therefore, will not be permitted to say in the complaint in this action that the charge so made was not true.

"The decision of these points will require, of course, a consideration of the complaint in this action and (as to the asserted estoppel) also a consideration of the complaint in the action by the plaintiff against the said Louis De Bock for a divorce.

"The complaint herein alleges: That plaintiff and Louis De Bock intermarried at Sacramento 'on the twenty-fifth day

of January, 1905, and ever since have been and now are husband and wife, and up to about the month of June or July of the year 1914, lived happily together as such husband and wife. That the conjugal affection, support, protection, care, comfort, and consortium of the plaintiff's said husband was and is a valuable property right to which plaintiff is entitled. 'That said Louis De Bock, on or about the first day of August, 1914, with the intent at such time to desert and abandon this plaintiff, wrongfully, willfully and voluntarily separated from plaintiff and then and there deserted and abandoned this plaintiff,' by reason of which plaintiff is now living separate and apart from her husband. That, by reason of said alleged wrongful acts, which are reproduced, plaintiff was compelled to bring an action for divorce against her husband which resulted in an interlocutory decree of divorce being entered on September 12, 1914. 'That some time about the month of June, 1914, and prior to the day of the said desertion and abandonment of plaintiff by her husband, the said defendants willfully, wrongfully, wickedly, maliciously, and injuriously combined, conspired, confederated and agreed and contrived, intending thereby to injure this plaintiff and to deprive her of the affection, support,' etc., of her husband, and 'said defendants by reason of said agreement and conspiracy, wrongfully, maliciously, willfully and wickedly behaved and conducted themselves continuously ever since said time, toward this plaintiff in an unkind, inconsiderate, unsociable, cruel, and inhuman manner, thereby gradually undermining and wholly destroying this plaintiff's happiness, peace of mind, and greatly injuring and impairing her health; said conduct . . . continually growing worse and more cruel, until by reason thereof, and in conjunction with the conduct of her husband . . . plaintiff suffered great and grievous mental anguish and pain' and she became sick and confined to her bed. That in execution of said conspiracy said defendants wrongfully, etc., continuously until about the first day of August, 1914, 'enticed, induced, begged, persuaded, and urged' her husband 'to deprive this defendant of all the things which it was the duty of said Louis De Bock to furnish this plaintiff as his wife, and to abandon and desert her and live separate and apart from her, and to refuse to live with her and to neglect her and keep her away from his said home and the home of these defendants, and for him-

self to remain and live with the defendants, August De Bock and his said wife, Ella De Bock, where defendant, Millie Fisher was, and is, a frequent visitor.' That said Louis De Bock did, on or about August 1, 1914, 'by reason of, and on account of, and as a result of the arts, wiles, designs, blandishment, machinations, and persuasion, in pursuance of said agreement and conspiracy . . . entirely desert and abandon this plaintiff and ever since said time has continued to desert and abandon her, and has during all of said times persistently and continuously neglected and refused to furnish this plaintiff all the things which' it was his duty to furnish her. That said defendants, 'combining, conspiring, confederating and agreeing, and willfully, wickedly,' etc., 'intending then and there to injure this plaintiff, to reduce her to penury and deprive her of the affection, support,' etc., of her husband, about the months of June, July, and August, 1914, 'absolutely and entirely alienated, estranged, and destroyed the affection of' her husband for her 'and alienated the affections of said Louis De Bock from plaintiff, and did illegally persuade, entice, and abduct said Louis De Bock from plaintiff, whereby the plaintiff has wholly lost and been deprived of the assistance, comfort,' etc., of her husband, to which plaintiff was entitled and otherwise would have had 'but for the illegal persuasion, conversation, and the said enticement, abduction, and doings and actions of the said defendants.' It was alleged that plaintiff had thereby been damaged in the sum of fifteen thousand dollars, and judgment was prayed for that amount.

"There was introduced in evidence the judgment-roll in the case of Catherine M. De Bock v. Louis De Bock, being the action for divorce referred to in the complaint. It appears therefrom that, on September 12, 1914, the complaint in said divorce action was filed in the superior court of the county of Placer, in which county the parties resided; that the answer of the defendant was filed, a trial of the action was had and findings and an interlocutory decree of divorce on the ground of cruelty were entered on the same day, the decree also providing for alimony to be paid the plaintiff and for a division between the parties of certain real and personal property. A final decree of divorce was entered in the action on September 28, 1915.

[2] "There was no demurrer to the complaint in this action, but even in the face of a general demurrer we would hold the foregoing allegations sufficient in the statement of a cause of action in a case of this character. The eighth paragraph in very plain and direct language charges the formation of a conspiracy by the defendants having for its object the alienation from the plaintiff of the affections of her former husband and thereby to deprive her of his protection, assistance, and consortium, that such conspiracy was actually executed or carried out by the defendants, and that by reason of the wrongful acts of the latter the plaintiff lost the love and the affection and the consortium of her said former husband. A complaint in substantially the same language was held good in *Humphrey v. Pope*, 122 Cal. 253, [54 Pac. 847]. It is true that the complaint contains some matters which are wholly immaterial to, and have no necessary connection with, the cause of action pleaded, unless they may be regarded as explanatory by way of inducement of the cause stated; but where, as here, the complaint contains averments which do state a cause of action, it cannot be held bad even under a demurrer, albeit it does also contain matters having no connection with or in no way tending to explain the facts constituting the cause of action or how or in what manner such facts came into existence. If the matters referred to are nonessential or redundant, they could have been stricken from the complaint on motion, in which case the complaint would, as stated, still state a cause of action against the defendants for the alienation of the affections of plaintiff's husband.

[3] "Nor is there any merit in the contention that the plaintiff is estopped in this action from denying certain facts alleged in her complaint in the suit for divorce against Louis De Bock. This contention arises from the fact that the plaintiff in the complaint in the divorce action charged that her then husband treated her in a cruel and inhuman manner for a period of more than one year 'next immediately preceding the commencement' of the action for divorce, particularizing therein certain occasions upon which acts of cruelty were practiced upon her by said Louis De Bock and specifically describing the nature thereof, some of which acts (it was alleged) having been committed in the month of August immediately preceding the month in which the action for

divorce was instituted, whereas, in the present action, the plaintiff alleges in her complaint that she and her former husband 'up to about the month of June or July, 1914, lived happily together as husband and wife.'

"It is, of course, elementary that estoppels bind only parties and privies. An estoppel by judgment can only arise and be invoked where the subject matter of the litigation and the parties are the same. Strangers to the suit or those not privies in law to the parties thereto are not precluded under the doctrine of estoppel from setting up rights which, as to them, have not been adjudicated in the action. While the estoppel sought to be invoked here is said to be an estoppel arising upon and in the pleadings, yet, if this were true, we can perceive no logical reason for holding that in effect the attempt here is not to invoke an estoppel by judgment, since the findings of the court in the divorce action are in strict accord with the facts stated in the complaint therein, and certainly, if the plaintiff is upon the doctrine of estoppel foreclosed the right to deny in this action the truth of the facts alleged in her divorce complaint, *a fortiori*, should she be likewise handicapped by the judgment in the divorce action, which involves a definitive and conclusive adjudication of the facts as pleaded by her, so far as is concerned the cause of action so stated as against her former husband. But be that as it may, it is very clear that, since the parties to the present action were not parties to the divorce action and the subject matter of the two actions is entirely and wholly different, the principle that an estoppel will not lie in such circumstances is equally applicable whether the claimed estoppel arises in the pleadings or by virtue of the judgment. [4] It follows that the complaint in the divorce action can perform no other office in this action than that of evidence of an admission upon the part of the plaintiff that the material facts stated in her divorce complaint, which was verified, are true. It is not, of course, conclusive evidence of the truth of the facts so stated and may be rebutted, but it constitutes an admission against interest which may and should be considered in the determination of the issues of fact in the subsequent action. 'A verified petition filed in one case by a party is competent evidence against such party on the trial of another case as a statement or admission, but is not conclusive and carries nothing of estoppel.' (*Solomon R. Co., v.*

Jones, 30 Kan. 601, [2 Pac. 657]. See, also, *Parsons v. Cope-land*, 33 Me. 370, [54 Am. Dec. 628]; *Murphy v. Hindman*, 58 Kan. 184, [48 Pac. 850]; *Warfield v. Lindell*, 30 Mo. 272, [77 Am. Dec. 614]; *Clemens v. Clemens*, 28 Wis. 637, [9 Am. Rep. 520]; 16 Cyc. 1050; Freeman on Judgments, sec. 417a; Black on Judgments, sec. 608; *Dahlman v. Forster*, 55 Wis. 382, [13 N. W. 264].)

"The remaining and by far the more important problems submitted for solution here involve the question whether the verdict derives sufficient support from the evidence and the further question whether certain rulings upon the evidence were erroneous and, if erroneous, whether prejudicial in their effect upon the substantial rights of the defendants.

"Although, as seen, the briefs contain portions of the testimony, the writer has performed the decidedly operose task of reading all the testimony, which comprises approximately seven hundred pages of typewritten matter. This burden was assumed because of the claim that the evidence is wholly insufficient to support the verdict, and that a number of errors in the admission and exclusion of certain evidence was committed at the trial, and, because, if they were errors, we are required to determine whether or not a miscarriage of justice has followed from those errors (Const., art. VI, sec. 4 $\frac{1}{2}$)—a question which can be determined in this case only after an examination of the evidence.

"It is, of course, entirely out of the question to essay a reproduction herein, even in substance, of all the testimony which was received and presented to the jury. All that can be done or which, in our opinion, it is necessary to do, is to state in a concise form all of what may be termed the controlling facts—that is, all those facts which, in any view or under any possible interpretation, may be said to afford or tend to afford support to the cause of action stated in the complaint. This we will now proceed to do.

"The defendant, August De Bock, spoken of as 'Gus,' is a brother of Louis De Bock, and defendant, Clara E. De Bock, referred to in the record as 'Ella,' is the wife of August. Defendant, Millie Fisher, for many years had been an intimate friend of her codefendants. She first met Louis De Bock and the plaintiff in 1912, when she visited their house in company with Ella De Bock. Louis De Bock was an engineer in the employ of the Southern Pacific Company.

"There was testimony tending to show that plaintiff and her husband lived happily together for a period of over nine years, from their marriage in 1905 until the spring of 1914. They lived mostly at Roseville and Blue Canyon, in Placer County. During the period above mentioned Louis De Bock treated his wife in a kind and affectionate manner. He would kiss both her and her mother, who lived with her part of the time, when he left the house to go on his run. Plaintiff testified that in about March, 1914, her husband became cool and indifferent toward her; that in June, 1914, he went to Colfax to work, leaving her at Blue Canyon, and that about the first of August he deserted her. She also said that defendants had always been friendly toward her and had visited her frequently until in the summer of 1914, when they ceased visiting her and became very indifferent and cool toward her. Some time in the month of August, 1914, plaintiff and her mother visited Ella De Bock and Millie Fisher at the house of said Ella in Blue Canyon and had a conversation with them. Plaintiff spoke of a letter written by Ella De Bock and asked why she had written it. Defendant Ella said that she had written, saying that plaintiff and her husband were having trouble. Plaintiff testified: 'She started in about my husband and she said that I was a fool to put up with him the way he was carrying on, and that he was low and dissipated, and she was sure he was running around with fast women, and she said that I was a superior woman to him; she said: 'The only thing left for you to do is to get a divorce; if I were you I would go away off to Los Angeles, where I never would come in contact with him again. You could take him to the desert of Sahara, and he would never be any different.' Asked by plaintiff if she was sure her husband was running around with fast women, defendant, Ella, said that 'she didn't know it for a fact, but was sure of it. . . . She said: 'I would take my maiden name back.' Plaintiff testified that defendant, Fisher, spoke up and said that she admired Ella for the way that she took the thing; that when she first met my husband she thought he was a pretty good-looking fellow; but she said, 'Now, he is low and dissipated, degraded looking,' and she said: 'Kate, you are a fool to put up with anybody like that; there is too many men in the world,' and she says: 'I could get one any time, but no man for me. I advise

you to get a divorce.' Plaintiff said that, in July, 1914, at the house of Ella De Bock, in Roseville, she had a conversation with her husband in which she asked him, 'What is the matter with you, Lou, anyway? Why are you treating me this way?' to which he replied, 'Kate, the only way for you and I to get along is for me to quit my job, and for us to go off where my folks will never know where we are.' Plaintiff said: 'Why do you talk that way? . . . My folks aren't trying to separate us.' At about the same time, at Roseville, plaintiff's husband told her he was not going to live with her any more, and said: 'If you don't think you have got grounds enough to get a divorce, I will get a woman and let you catch me with her'; and plaintiff said he told her 'he had been running around with fast women, and all that sort of thing; he wouldn't live with me any longer.' She said that she had tried to get him to come back to her, even after she had filed her complaint for divorce, but that he said: 'It has gone this far, let it go through.' Plaintiff said that when she would go to the train to see her husband, if Gus and Ella De Bock were there he would hardly speak to her, but that when she would go the next day, if he was alone, he would get off the engine and kiss her and be himself again.

"Mrs. Rose Gray testified that very often she and Ella De Bock discussed the plaintiff and that on one occasion said Ella stated that 'the only way Lou could get rid of her was to take her meal ticket away from her.' It appeared that plaintiff had a painting which she had taken to Sacramento to have valued and Ella said to the witness that 'she didn't care if she got a hundred thousand dollars for the picture, just so she got out of the family, and let the De Bocks alone; that Gus said he would give her five dollars if she would take her maiden name back'; that plaintiff's influence was so strong over her husband 'that they would have to move away until this thing was put through.' At one time, speaking of the Caminetti case, Ella said to witness 'that she didn't blame Drew Caminetti at all, if he was in love with the girl, and that his own father upheld him, and that if she were in Lou's shoes, she would do the same.'

"Louis De Bock first met defendant, Fisher, in 1912, when she, with Ella De Bock, visited the home of himself and wife at Blue Canyon and remained there about eight or nine days.

They made them another visit of two or three days' length in 1913. In the same year, Ella De Bock had a cottage at Truckee, where Miss Fisher was her guest. Louis De Bock visited them every Saturday night for about two months. He testified that in 1914 he saw Miss Fisher one evening in Oakland at his sister's house and later the same year he met her again in Oakland.

"During the month of July, 1914, Mrs. Ella De Bock wrote to Mrs. Rose Gray, who lived at Blue Canyon, requesting her to secure a house for her at the canyon during the summer months and not to let plaintiff know of it. Mrs. Gray secured a house and Mrs. Ella De Bock and Miss Fisher occupied it from the middle or latter part of July. Miss Fisher testified she had always been friendly with plaintiff and had visited at her house until the summer of 1914, but that at that time 'we were requested by Mrs. Gus De Bock to stay away from there, not mix in our family affairs.' At about this time, Ella De Bock and Miss Fisher kept their clothes on most of one night without retiring in order to be sure of meeting the respondent's husband as he passed through on his run at 4 o'clock in the morning. He dismounted from the engine and hugged and kissed both of them. On one occasion Clara E. De Bock met Louis De Bock at a train and 'patted him on the face in an affectionate way.' From June 15 to July 5, 1914, Louis De Bock roomed at the house of Mrs. Jessie M. Wales, at Colfax. Louis was then the fireman on the locomotive engine of which Mrs. Wales' husband was the engineer. While stopping at the Wales', Louis received one or more letters from the defendant, Fisher, signed 'Millie,' and he spoke of her on those occasions as 'My Mill,' and called her his 'pal' and friend. On one occasion Louis showed Mrs. Wales some samples which he said were samples of Millie's dresses and that she [Millie] had sent them to him.

"In August, 1914, defendant, Gus De Bock, went to plaintiff's house to get Louis De Bock's hunting clothes. She said he told her that four men, including himself and her husband, were going on a hunting trip; that no women were going along. The three defendants went by train to Reno and were there met by Louis De Bock. From Reno the four of them, with a man named Judd, started in an automobile belonging to Gus De Bock and drove to Sacramento.

The party stayed two days in Sacramento, Louis De Bock stopping at a hotel and the defendants going to the home of the mother of Mrs. Ella De Bock. The defendants and Louis De Bock then went in the automobile to Nelson, Chico, Oroville, and Lincoln, remaining one night in each place. They had a camping outfit with them, but the testimony was that they did not camp out at any time. The auto trip consumed about a week.

"We have now presented herein the salient facts brought out by the testimony. There are many other facts in the record of the same general character of those embraced in the foregoing statement to which we have not considered it necessary to make specific reference herein for the purpose for which the evidence is to be considered here.

"It must, of course, be conceded, in view of the verdict, that, notwithstanding that the plaintiff in her divorce complaint under oath declared that 'for more than one year next immediately preceding the commencement of the foregoing action, defendant has treated plaintiff in a cruel and inhuman manner,' etc., specifying times and places when and where such acts of cruelty were committed, she and her former husband, down to a few weeks prior to the commencement of said divorce suit, lived amicably and happily together, never prior thereto having had anything more than those inconsequential misunderstandings which are common among married people and which are mere temporary outbursts, generally not followed by serious results. These further facts are, from the verdict, to be conceded as having been established: That from the date of the intermarriage of Louis De Bock and the plaintiff, in the year 1905, down to about a year prior to the date of their separation by divorce, the defendants, Gus and Clara E. De Bock, were on uniformly friendly terms with the plaintiff; that at about the time indicated they turned against the plaintiff, the defendant, Gus De Bock, having developed a feeling of intense hatred for her; that both Gus and Clara E. De Bock were at the least agreeable to if not anxious for a permanent separation of the plaintiff and Louis De Bock; that Gus and Clara De Bock, as well as Louis De Bock, were very much attached to Millie Fisher, and that the latter reciprocated that sentiment as to all those three persons; that both Gus and Louis De Bock almost invariably, upon returning from their runs

(Gus being also a locomotive engineer in the employ of the S. P. Co.), greeted both Clara E. De Bock and Millie Fisher, upon meeting them on those occasions, in a very affectionate manner, often kissing the women; that Gus De Bock, Clara E. De Bock, Millie Fisher, and Louis De Bock, between themselves arranged the outing in the automobile, mentioned above, and that (it may reasonably be inferred) it was the purpose of all of them to make the plaintiff believe that the party constituting the 'outing party' was to consist entirely of men—that no females were to be members thereof. It is further to be conceded that it is fairly and reasonably inferable from the evidence that Gus and Clara E. De Bock had discussed with Louis De Bock the proposition of a permanent legal separation between himself and the plaintiff. In a word, it is the duty of this court to assume that every word of the evidence as to the acts and conduct of the defendants in connection with the plaintiff and Louis De Bock is absolute verity," and so viewing the record, what shall we conclude as to the sufficiency of the evidence to support the verdict?

"Unquestionably, the theory upon which the complaint proceeds is that there existed between Louis De Bock and Millie Fisher a mutual sentiment of love and affection; that Louis, having transferred his affections from the plaintiff to Miss Fisher, desired to be freed from the then insuperable legal obstacle in the way of making that young woman his wife; that Gus and Clara De Bock, being greatly attached to Miss Fisher and having conceived a deep feeling of animosity against the plaintiff, joined Miss Fisher (and perhaps Louis De Bock) in a scheme the consummation of which would be the divorcement of the plaintiff and Louis and the subsequent intermarriage in due legal time of the latter and Miss Fisher. At the time of the trial of this case—over two years after the plaintiff was divorced from her former husband—Louis De Bock and Millie Fisher had not intermarried. There is no direct evidence that they ever intended to intermarry or that they were more than good friends. There is no evidence that they ever maintained improper relations with each other, unless it is to be declared that the fact that he, as did Gus De Bock, in the presence of his wife, often kissed her when he met her affords an inference of meretricious relations between them, a proposition abhorrent to decent and right thinking. But let it be assumed that Louis De Bock

was 'in love' with Millie Fisher, that she loved him and that as a consequence Louis lost all love and affection for his wife; yet the truth remains that there is no direct evidence that that condition was not brought about wholly and solely through the conduct and acts of Louis himself. In other words, if it be true that there was generated and developed in the hearts of Louis De Bock and Miss Fisher a mutual sentiment of love and affection sufficient to overcome and destroy the love and affection which Louis once had for the plaintiff, the evidence, while perhaps having a slight tendency to the contrary, does not clearly show but that Louis himself was the wooer and not the wooed, and that he himself took the initiative in bringing about that state of feeling or sentiment between them. In short, the record discloses very slight evidence, the effect of which is to negative the proposition that Louis De Bock's whole conduct toward Millie Fisher was his own voluntary act, uninfluenced by any active interference on her part. (*Buchanan v. Foster*, 23 App. Div. 542, [48 N. Y. Supp. 732, 735].)"

[5] Upon further consideration we have reached the conclusion that not only is the evidence against Millie Fisher very slight, but that it is not legally sufficient to justify a verdict against her.

"The evidence is obviously stronger against the De Bock defendants than it is against Miss Fisher. But the evidence against all the defendants is entirely of circumstances. There is no direct evidence that the conduct and acts of any of the defendants constituted the cause of the abandonment by Louis De Bock of his wife or his loss of affection for her," but considering all the circumstances disclosed by the record, we think it cannot be said that the verdict as to the De Bocks is unwarranted.

In cases like this, depending for their support entirely upon circumstantial evidence, the task of the reviewing court is more difficult than in those instances wherein the verdict rests, in part at least, upon the direct testimony of witnesses. This circumstance furnishes an additional reason why we have given this record such deliberate consideration, devoting especially close attention to the questions whether the verdict is supported, and whether any prejudicial error was committed by the trial court in its rulings upon the admissibility of evidence.

As to the sufficiency of the showing to support a rational inference in favor of plaintiff we have already declared our judgment. It remains to notice the other specifications of alleged error, and of these only five are regarded of sufficient gravity to require specific attention.

1. The record shows the following proceedings while the plaintiff was on the stand: "Mr. Johnson: Q. In July, 1914, when you were visiting Ella De Bock at Roseville, did you have a conversation with your husband at that time? A. Yes. Q. Well, what was it? A. Well, I asked him what was the matter with him and he told me—we had—we took a walk; he had not been treating me right, for quite a while, and we took a walk and Ella De Bock, she went out some place, and him and I took a walk, and I asked him: 'What is the matter with you, Lou, anyway? Why are you treating me this way? And he said, Kate, the only way for me to get along,'— Mr. Wachhorst (Interrupting): 'We object to that as irrelevant, incompetent and immaterial.' The Court: 'It will be admitted for the purpose of showing the relations existing between the witness and her husband; not for the purpose of binding the defendants, except as it would show the relations. Go on'— A. Well, we took a walk, and I asked him what was the matter with him that he was treating me the way he was, and he said: 'Kate, the only way for you and I to get along, is for me to quit my job, and for us to go off *where my folks will never know where we are*—never find out where we are.' I said: 'Why do you talk that way? My folks aren't trying to make trouble with me'—I asked it of him—and I said: 'You do not want to quit your position,' and I said to him: 'If you feel that way why don't you quit?' and he said: 'No, I will take a lay-off.' And I said, 'My folks aren't trying to separate us.' He said: 'That is just the way it stands.'" The point of the objection is that "the defendants could not be prejudiced by any declaration, act, or omission of plaintiff or her husband not made in their presence." (Code Civ. Proc., sec. 1848; *Humphrey v. Pope*, 1 Cal. App. 376, [82 Pac. 223]; *Bashare v. Parker*, 146 Cal. 529, [80 Pac. 707].)

It is quite obvious, however, that the only portion of the answer that could possibly prejudice the defendants was the statement in reference to their going away "*where my folks will never know where we are.*" But a sufficient answer to

appellants' criticism of this is, that no motion was made to strike it out. [6] The question itself was concededly proper, as evidence of conversations between the husband and wife was admissible to indicate their feelings toward each other. Hence, any objection to the question would have been properly overruled. But, if it may be said that the objection of appellants made in the midst of the answer can be considered as a motion to strike out, then, it is quite apparent that the motion was properly denied, since she had up to that time said nothing whatever to connect appellants in the slightest degree with any trouble between herself and her husband. [7] The proper practice in such cases is well settled, and it is sufficient to refer to the decision of the supreme court in the case of *People v. Lawrence*, 143 Cal. 148, [68 L. R. A. 193, 70 Pac. 893]. Therein it is said: "Under such circumstances, where it is not apparent from the question itself that the response thereto will, upon any theory of the case, be inadmissible, an objection alone to the question will be of no avail, but the party must, when the inadmissible evidence is for the first time disclosed by the answer, move to have it stricken out. *This is the proper and only remedy, and the appellant here having failed to avail himself of such a motion is not in a position to predicate error merely upon a question which, upon its face, did not show that the testimony to be given in response to it would necessarily be inadmissible.*" Moreover, the court in its ruling limited the consideration of the evidence to the single purpose of indicating the relation of the parties, and we must presume on appeal that it was considered by the jury only for that purpose.

2. Complaint is made of the testimony of a Mrs. Wales that Louis De Bock told her either in June or July, 1914, that he had received two letters from the defendant Fisher. But the court struck out this evidence in the following language: "As to the letters which Lou De Bock told her he received from Millie Fisher, why the motion will be granted. It is hearsay, anything that is told her, and her only information is what he told her—is hearsay." Furthermore: "The court instructs the jury that as the court has granted the motion to strike out that portion of the witness' testimony wherein she stated what Louis De Bock had told her concerning letters, and what he told her concerning whom

the letter was from; but as to the letters which she saw herself and read, and the testimony will be one letter; that stands, and is not stricken out." Appellants contend that there is some uncertainty as to this ruling. But it is clear that everything that was said by Louis De Bock was stricken out. There was nothing left of any importance in the answer to the question, to which an objection had been made. The one letter to which the court refers was undoubtedly the one concerning which she testified without objection when she was asked the question: "Did Lou De Bock ever give you any letters to mail to Millie?" and she answered, "One." Furthermore: "What did you do with it?" and she answered: "I burned it." [8] But, if we concede that the court did not fully strike out the testimony to which an objection was made, it is quite apparent that it resulted in no prejudice to appellants, since the same fact was shown without objection. (*Fernandez v. Watt*, 26 Cal. App. 86, [146 Pac. 47]; 3 Corpus Juris, 815.)

3. The situation is similar in reference to the ruling of the court as to a conversation between plaintiff and one Bob Wales as to said correspondence. If error was committed, it was clearly without prejudice for the reason already stated.

Besides, the contents of the letters were not shown, and it cannot be assumed that there was anything therein of a compromising or improper character, or that the jury was influenced against any of the defendants by the mere circumstance that Lou De Bock had corresponded with Miss Fisher.

4. It is urged that the court erred in refusing a request of appellants to cross-examine the plaintiff in reference to a conversation with her husband. The request itself was somewhat indefinite, being in the following language: "Well, now, your Honor, in regard to Ben Smith, may I ask the question regarding a conversation along the same lines with her husband?" The reference to "Ben Smith" may be understood when we recall that appellants had unsuccessfully attempted to question the witness about a conversation with said Ben Smith. [9] If appellants desired to interrogate plaintiff concerning a conversation with her husband, they should have put the inquiry in more precise terms. It does, indeed, appear that the court did not so understand the question. Again, they should have asked the question of the witness directly to make it the proper subject of review.

Moreover, the question does not purport to be in reference to any quarrel, disagreement or dissension between her and her husband. If such was the purpose of the question, it should have been disclosed to the court. In *County of Sonoma v. Hall*, 129 Cal. 659, [62 Pac. 213], objections were sustained to certain questions upon cross-examination. It was contended on appeal that the questions should have been allowed for a certain purpose, not evident on the trial, but the supreme court said: "If such was the purpose of the questions, a direct question should have been asked in such manner as to show the aim of counsel."

Again, assuming that counsel desired to ask the witness concerning a controversy about her having been in a hospital at Sacramento, it may be said that the husband testified fully as to the conversation, and it thus appears that the conversation did not amount to a quarrel, and the fact that they lived together for six years thereafter is quite satisfactory evidence that said conversation did not cause their separation.

5. Plaintiff was asked on cross-examination concerning a "disagreeable conversation" with her husband about one Schultz. [10] The trial judge made an objection to the question and then sustained his own objection. Such procedure is not to be commended except in unusual cases. Counsel for respondent seem to have been amply able to fully protect the interests of their client, and they should have been permitted to make whatever objection they deemed advisable. But what has been said in reference to the preceding matter will apply to this question which related to an occasion of six years prior to the separation of the parties. And whatever discord was thereby created was clearly condoned and forgotten in the subsequent six years of felicitous marital relation.

Some complaint is made of certain criticism made by the trial judge of one of the witnesses and of the counsel for appellant. It may be admitted that the stricture should not have been indulged in, but the jury was fully and clearly instructed to disregard everything said by the court along that line and we must assume that the instruction was followed.

The judgment as to Millie Fisher is reversed and as to the other defendants it is affirmed.

HART, J.—As the writer of the former opinion filed in this cause, and in view of the fact that we have reached a different conclusion from that arrived at on the former consideration of the case, I deem it proper to explain that in the original consideration I was misled by the lack of clearness of the record as to the action of the court with respect to certain evidence to which objections were, in my opinion, well taken, and which I conceived to be, in view of the slightness of the proof against the defendants, sufficiently prejudicial to require a reversal of the judgment as to all the defendants. Upon a reconsideration of the rulings upon which the reversal by the former opinion was ordered, however, I find, as the present opinion shows, that the court struck out all the damaging portions of certain testimony to which objection was made and that, as to other testimony, which I held to be erroneous and prejudicial, no motion was made to strike it out after it had been given, although there was an objection made to it after it got into the record. As the main opinion shows, in such circumstances—that is, where a proper question elicits from a witness improper testimony—the remedy is by a motion to strike out such testimony, a mere objection to it not being sufficient to preserve the right of the objecting party to have the question so raised reviewed. Other rulings as to other testimony which appeared to my mind to be prejudicially erroneous are disposed of satisfactorily to me in the present opinion of the court.

I desire further to add that, after a fuller consideration of the case, I am still convinced that the judgment should not stand against the defendant, Fisher. While it appears that the three defendants were close friends and companions, and that Louis De Bock was also very friendly with Miss Fisher, it was not made to appear that the latter did or said anything calculated to cause an estrangement between the plaintiff and her husband, or that she had or entertained any feeling of animosity or unkindness toward the plaintiff. There is no evidence tending to show that Miss Fisher ever attempted to persuade Louis to desert his wife or ever said anything to Louis or any other person in the least derogatory of the personal character of the plaintiff. There is, in short, nothing in the evidence tending in the slightest degree to connect Miss Fisher with a conspiracy to which the defendants, De Bock, might have been parties, the object of

which was to cause a separation and divorce between the plaintiff and Louis De Bock. The fact that Miss Fisher was on intimate terms of friendship with her codefendants and Louis De Bock is without special significance in the absence of proof that she had committed acts or uttered words calculated to influence Louis against the plaintiff, and which were designed by her to cause the alienation from plaintiff of Louis' love and affection. There are, it is true, some circumstances from which the conclusion might justly follow that Louis De Bock and Miss Fisher were "in love with each other," but, conceding that to have been the case, there is no evidence showing or tending to show that Miss Fisher was responsible for that state of the affairs between them. In other words, putting it in the language of the main opinion, it was not made to appear but that Louis himself "was the wooer and not the wooed," and that but for what might have been, so far as the record discloses, his undue attentions to her, wholly initiated and persistently prosecuted by him, she would not have given him any serious thought as an unholy suitor for her affections. These observations are, of course, based upon the assumption that a reciprocal sentiment of love had developed between Louis and Miss Fisher, a fact as to which the evidence is by no means clear and convincing, since, after all, the evidence as to the relations between Louis and Miss Fisher and the sentiments they entertained for and toward each other is justly capable of the interpretation that their relations at all times were only those which commonly exist and are entertained between mere friends or between persons entertaining no thought of each other beyond that which is motivated by a mere ordinary sentiment of friendship.

But it is not necessary to discuss this matter further. I am satisfied, from a thorough examination of the record, that no case was made against Miss Fisher, and for the reasons stated in the main opinion I concur in the reversal of the judgment as to the defendant, Fisher, and in its affirmance as to the defendants, De Bock.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 14, 1919.

All the Justices concurred.

[Crim. No. 862. First Appellate District, Division Two.—September 17, 1919.]

THE PEOPLE, Respondent, v. RICHARD SARTORI,
Appellant.

- [1] **CRIMINAL LAW—ROBBERY—COMPLICITY OF DEFENDANT—EVIDENCE—VERDICT.**—In this prosecution for the commission of a robbery, although the defendant on trial was not present at the time the crime was committed, the jury was justified in concluding from all the surrounding circumstances that he participated in the crime.
- [2] **ID.—WANT OF DIRECT PROOF OF CONSPIRACY—INFERENCE PROPER.** Under the circumstances which occurred, the jury was justified in drawing an inference of guilt of the crime of robbery, although the prosecution failed to prove a conspiracy through the testimony of the codefendants, who had pleaded guilty, and there was direct uncontradicted evidence in behalf of the defendant that no conspiracy existed.
- [3] **ID.—PROOF OF DETAILED PLAN NOT NECESSARY.**—In a prosecution of several defendants for the commission of a robbery, it is not necessary for the prosecution to prove that a detailed plan of the robbery had been arranged among them.

APPEAL from a judgment of the Superior Court of Fresno County. M. F. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Frank Curtin and Carl E. Lindsay for Appellant.

U. S. Webb, Attorney-General, and R. L. Chamberlain for Respondent.

NOURSE, J.—Defendant was charged, together with his codefendants Sasselli and Gatti, with the crime of robbery, by taking from the possession of one Joe Ponti a certain sum of money by force and fear. Defendants Sasselli and Gatti both entered pleas of guilty. The defendant Sartori stood trial, was convicted by the jury, and prosecutes this appeal. The sole ground for reversal urged in his behalf is that the evidence is insufficient to justify the verdict of conviction.

The undisputed facts are that this defendant first met Ponti in a saloon in Fresno one evening at about 6:30 o'clock; that

Ponti had just recently arrived from Stockton; that the two had several drinks together at the bar, where Ponti displayed considerable money; that the other two defendants were in the same saloon drinking at the same bar; that defendant Sartori left Ponti for a short time and went out to the sidewalk, where he met Sasselli, to whom he said he "had a friend inside, from Stockton; he has eighty dollars; saw him buy a drink, and he changed a twenty dollar gold piece." It then appears that after more drinks were had Sartori suggested to Ponti that they go out and have some tamales. As they stepped outside of the saloon he urged Ponti to get into Sasselli's automobile, which was standing near by, saying he would follow on his bicycle. Ponti, Sasselli, and Gatti drove off in the automobile and Sartori followed for a few blocks on his bicycle. Sasselli, driving the machine, turned into the country, and when several miles out of town he and Gatti forcibly took Ponti's money from him, put him out of the machine and turned back to town.

On their way back Gatti gave Sasselli fifty dollars, telling him he had taken seventy-five dollars from Ponti and that twenty-five dollars, half of that given to him, was for Sartori and half for himself. When they reached town Gatti got out of the machine and Sasselli proceeded a few blocks until he picked up Sartori, to whom he handed twenty-five dollars, telling him that Gatti had taken seventy-five dollars from Ponti and had given him fifty dollars to be divided between Sartori and himself. Thereafter Sartori went to the saloon where he first met Ponti, and, as he entered, overheard Ponti relating his experiences to the proprietor and accusing "the man with the bicycle." Sartori stepped up, and as to what then occurred the testimony of the proprietor of the saloon shows: "Sartori comes in and he says to Ponti, 'I am the man with the bicycle'; and so Ponti says, 'I will go up to make my own complaint and to fight it out,' and Ponti asked me what place was the police headquarters, and I show him; and Sartori says, 'If you want to go out there, I will show you; I will go with you.' And so when it started that way and Sartori says, 'If you put me in the complaint, I will fix you'; and Ponti says, 'Never mind,' he says, 'I am going to make my own complaint'; and so Sartori tells him again, 'I will fix you.' At the same time he hit him and he fell on the floor."

[1] It is undisputed that this defendant was not present at the time the crime was committed. To show his participation in the crime the prosecution relies upon the following circumstances: That he endeavored to make himself very agreeable to the complaining witness as soon as he learned that he had money to spend; that he told his codefendant Sasselli that the complaining witness had eighty dollars; that he urged the complaining witness to go out to get something to eat and then persuaded him to get into the automobile of Sasselli; that he accepted twenty-five dollars of the money taken from the complaining witness, which represented one-third of the profits of the robbery; and that when this defendant re-entered the saloon and heard the complaining witness telling of the robbery and placing the blame on the man with the bicycle that he immediately asserted his innocence, although still retaining his share of the spoils, and attacked the complaining witness when he learned that a criminal charge was to be laid against him. This defendant attempts to explain the receipt of the money from Sasselli by saying that Gatti owed him money, but his testimony was far from convincing, and, like the rest of his story, came from a man showing a guilty knowledge of the entire affair. After a careful examination of the entire record it is difficult to see how the jury could have reached any other verdict than that returned.

[2] Appellant, attacking the verdict, insists that, as the prosecution failed to prove a conspiracy through the testimony of Sasselli and Gatti, the jury was not justified in drawing an inference of guilt under the circumstances which occurred. The argument is that, where direct uncontradicted evidence is introduced to show that no conspiracy existed, the jury is not warranted in drawing the inference of the existence of such conspiracy from the facts proved, citing *Maupin v. Solomon*, 41 Cal. App. 323, [183 Pac. 198]. But if the rule of that decision is as stated by appellant, then it cannot be the rule in criminal cases. If it were, there could be no conviction on circumstantial evidence if the defendant or anyone in his behalf took the stand and directly denied the commission of the crime.

[3] In the instant case the defendant is charged as a principal on the theory that, although not present at the time of the robbery, he did aid and abet in its commission. (Pen.

Code, sec. 971.) It is not necessary for the prosecution to prove that a detailed plan of the robbery had been arranged among the three parties. No conversation may have been necessary between Sartori and Sasselli or between Sartori and Gatti. Sartori gave the information regarding Ponti's possession of the money, and urged him to get into Sasselli's automobile with Gatti on the representation that they were going to have something to eat.

All of the circumstances lead inevitably to the conclusion that the defendant participated in the fruits of the crime with guilty knowledge and criminal intent. The jury chose to follow the only inference that could be reasonably drawn from these circumstances rather than the denials made by those jointly charged with the crime.

The evidence as outlined is sufficient to support the verdict, and the judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2910. First Appellate District, Division Two.—September 18, 1919.]

**In the Matter of the Guardianship of the Person and Estate
of PHEBE R. KING, Incompetent.**

[1] GUARDIAN AND WARD—CONFLICTING EVIDENCE—FINDING—APPEAL.

Where, in a proceeding for the appointment of a guardian, the evidence is conflicting, but enough appears to support the findings of the trial court that the person in question is not incompetent and that no fraud had been practiced upon her, the judgment will be affirmed on appeal.

[2] ID.—DEATH OF ALLEGED INCOMPETENT—DISMISSAL OF APPEAL.—

If, on such an appeal, the statement contained in a letter presented to the appellate court before which such appeal is pending to the effect that the alleged incompetent had died pending the appeal, and asking that the matter be submitted, is sufficient as a suggestion of death, the ordinary course would be to dismiss the appeal. The effect of such a dismissal would be the same as an affirmation of the judgment.

1. Right of applicant to appeal in proceedings to appoint guardian for incompetent person, note, 15 L. R. A. (N. S.) 436.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge. Affirmed.

The facts are stated in the opinion of the court.

N. Lindsay South and Everts & Ewing for Appellant.

Harris & Harris and C. W. Trabing for Respondent.

BRITTAIN, J.—While Phebe R. King, aged eighty-three, was living with one of her sons, other children petitioned for the appointment of a guardian, alleging she was incompetent and subject to fraud, which they further alleged was being practiced upon her. The petition was denied. [1] The appeal was based wholly on the claimed insufficiency of the evidence to support the findings that she was not incompetent and that no fraud had been practiced. The evidence was conflicting and enough appeared to support the findings. In such a case the judgment will be affirmed. (*Matter of Daniels*, 140 Cal. 335-337, [73 Pac. 1053].)

[2] When the matter was called for argument a letter from counsel for the appellants was presented. It contained a statement that Mrs. King had died pending the appeal, and asked that the matter be submitted. If the statement in the letter was sufficient as a suggestion of death, the ordinary course would be to dismiss the appeal. The effect of such a dismissal would be the same as an affirmance of the judgment.

The judgment is affirmed.

Langdon, P. J., and Nourse, J., concurred.

[Civ. No. 2006. Third Appellate District.—September 19, 1919.]

RAYMOND J. TURNER et al., Appellants, v. F. E. BUSH et al., Respondents.

- [1] **WATERS AND WATER RIGHTS — TITLE BY PRESCRIPTION — BURDEN OF PROOF—FINDINGS—EVIDENCE—APPEAL.**—The rule that the burden is upon the party who claims certain water rights by prescription to clearly prove by competent evidence all of the elements essential to such title is especially for the guidance of the trial court. If there is any substantial evidence in the record on appeal from which a rational inference may be drawn that the various elements of prescriptive right exist, the appellate court is bound by the findings of the trial court.
- [2] **ID.—CASE AT BAR — TITLE BY PRESCRIPTION — CONCLUSIONS OF TRIAL COURT—LEGAL JUSTIFICATION FOR.**—In this action brought to secure a permanent injunction to prevent the defendants from using or from interfering with the use by plaintiffs of one-third of the waters of a certain creek, there was legal justification for the conclusion that defendants and their predecessors in interest used all the water continuously, openly, and under a claim of right for at least five years and, therefore, acquired a title by prescription.

APPEAL from a judgment of the Superior Court of Modoc County, and from an order denying a new trial. Clarence N. Raker, Judge. Affirmed.

The facts are stated in the opinion of the court.

Sharp & Henderson, Dodge & Barry and N. J. Barry for Appellants.

Daly B. Robnett for Respondents.

BURNETT, J.—The action was brought to secure a permanent injunction to prevent the defendants from using or from interfering with the use by plaintiffs of one-third of the waters of a certain South Deep Creek, which is a natural stream of water in Surprise Valley, Modoc County. Plaintiffs based their claim upon an alleged prior appropriation

2. Essentials of title to water by prescription, note, 93 Am. St. Rep. 719.

by the patentee of their lands, one Jacob F. Bittner, and in a separate count set up the claim of title by prescription. Defendants answered separately and denied all the material allegations of the complaint except the ownership of the lands by plaintiffs, and they filed a cross-complaint in which they claimed all the waters of said creek, first by virtue of prior appropriations, second by adverse user for the prescriptive period of five years, and defendant Bush made a further claim to said waters of said stream as riparian proprietor. Judgment was for defendants and the appeal is by plaintiffs from said judgment and from the order denying their motion for a new trial. There is really no controversy over the Bush claim to one-third of the water, the evidence all showing that he was and is entitled to it, and, therefore, concededly, the judgment as to him must be affirmed. The only dispute is as to the two-thirds of the water claimed by defendant K. M. Lester, plaintiffs insisting that they are entitled to one-half of that two-thirds, it being admitted by them that said defendant owns and is entitled to the use of the other one-half, or one-third of the whole flow. There was no evidence of any appropriation of any of the water by said Jacob F. Bittner, so that it may be said there was a failure of proof as to this allegation of the complaint. It appeared, however, that for more than thirty years prior to March 15, 1912, all the lands involved herein and all the waters of said creek were owned and used by one Christopher T. Sharp. There is evidence that said Sharp used and appropriated said water equally for the irrigation of said three tracts, and, hence, the contention is made by appellants that one-third of said flow became appurtenant to the land now belonging to plaintiffs and passed with the deed to George Turner and Sallie C. Turner executed by said Sharp on said March 15, 1912, and thereafter to plaintiffs through the deed executed to them by said George Turner and Sallie C. Turner on the first day of May, 1915. This is the theory upon which plaintiffs relied in the court below. In that respect there was a departure from the scheme of the complaint, but no objection was made to the course pursued and it cannot be urged now as a sufficient reason for the affirmance of the judgment. In opposition to this claim of plaintiffs it was the contention of defendants, especially defendant Lester, that Sharp reserved the water right attached to the land conveyed to plaintiffs' pre-

decessors in interest, and transferred the entire water right in and to the use of said stream to the defendants or their grantors. This claim was and is based upon the peculiar language of the deeds executed by Sharp to the respective parties on said March 15, 1912, and also certain parol evidence of the intention of the parties, which was allowed over the objection of appellants. It may be said that it is at least questionable whether the lower court's ruling as to the admissibility of this evidence was correct, and also whether there is sufficient competent evidence to support the finding of the court that "said Jacob F. Bittner did not, nor did any other grantor of plaintiffs, ever divert from said stream into any ditch by means of any dam, or otherwise, or by means of any ditch, or otherwise, convey an amount of water equal to one-third of the greatest flow of the waters of said stream, or convey any amount of the waters of said stream to or upon the above described lands of plaintiffs." We think, though, that we may forego the consideration of these and some other questions discussed by counsel. We reach this conclusion by virtue of the fact that the court found that defendants have acquired a title by prescription to all the waters, and that there is sufficient evidence, as we are required to view it, to support said finding. It will not be disputed that this finding in connection with the undisputed facts is sufficient upon which to base the judgment and that, if supported, it renders immaterial other findings to which objection is made.

[1] In considering the sufficiency of the evidence to support said finding we are not unmindful of the rule as thus stated in *Clarke v. Clarke*, 133 Cal. 667, [66 Pac. 10]: "The burden is upon the party who claims by prescription to clearly prove by competent evidence all of the elements essential to such title. The user must have been adverse to the true owner and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession . . . It must, in some way, be asserted in such manner that the owners may know of the claim." But that rule is especially for the guidance of the trial court. The principle which controls us is that if there is any substantial evidence in the record from which a rational inference may be drawn that said elements of prescriptive right exist,

then this court as an appellate tribunal is bound by the finding of the trial court.

It is also to be remembered that the initiation of the "adverse possession" could not be earlier than March 15, 1912, nor could it continue beyond the month of June, 1917, that being the time when this controversy over the ownership of the water arose. But as seen this period covers more than five years.

[2] With these preliminary observations, we herewith set out the principal evidence upon which is based the claim of title by prescription.

One W. A. Mickle, who was the immediate predecessor in interest of defendant K. M. Lester as to a portion of her lands and who managed the lands which Mr. Bush then owned and afterward sold to Miss Lester, testified in part as follows: "From March 15, 1912, I continued to own the land until about the first of April, I think it was 1917. I occupied the land from March 15, 1912, to April, 1917. During that time I was familiar with the Bittner Pre-emption. In 1912 Stewart had it leased. George Turner, I think, was the owner of it. From 1912 until 1917 I used water on the land that was conveyed to me. I got the water from South Deep Creek. I used it continuously, for the purpose of irrigating alfalfa, grain, garden, and orchard. The waters were necessary for the watering of crops on the land. I am familiar with the Sharp Pre-emption. During the time that I had charge of the land, I had charge of the portion of the Sharp Pre-emption that Mr. Bush had purchased and I used a portion of the water of South Deep Creek on that land. *My use was open.* Whenever I wanted water I took it. I do not think anyone was living on the Bittner land [land of plaintiffs] the first year. Mr. Stewart was living on the adjoining land and had it leased. During the year 1912 neither Stewart nor Turner used any water on the Bittner land from South Deep Creek to my knowledge. The ditch that they used to take the water to the Bittner tract is not far from my house and I had occasion to cross the ditch frequently and I crossed the ditch occasionally and observed it and they used water through that ditch that season. I cannot give the exact date but *it was early in the spring, shortly after I moved on the place.* I think John Stewart turned the water into the ditch. Prior to the water being turned into the ditch I had a con-

versation with Mr. George Turner, who was then owner of the Bittner land. *He came to my place and asked me if I would go with him up to Mr. Stewart's place and tell him to turn the water from South Deep Creek down through that place, as he wanted to take the water to what was known as the big Turner ranch. He had just sold that ranch to Mr. Alvord, and he wanted the water on it in order to make a good showing on that place. I told him that I was not using the water and that we would both go up there, and then we went to Mr. Stewart and told him to take the water and run it down there, which he did. I cannot tell exactly how long the water ran down there because I was busy. I had plowing to do and I could not use the water. It might have run down there a week or two weeks. When I got my plowing done I took the water and irrigated my alfalfa and grain. I turned all of the water off of the Turner ranch and used it on the land I had leased from Mr. Bush and on the land I owned. . . . I used all the water from South Deep Creek except the one-third that went to the Dodson lands [lands of defendant Bush] continuously on the lands described in the deed to me and the deed to Mr. Bush from 1912 to 1917, without interference or interruption by anyone. . . . During the time I was farming the Sharp land I bought, and that which Bush bought, I used all the water in South Deep Creek on those lands, except one-third that went to the Dodson place, and I used it continuously, openly, notoriously and under claim of right. No one interfered with me, except through my permission and I asked no one's permission to use it."* The foregoing would justify the trial court's finding under the doctrine of *Gurnsey v. Antelope Creek etc. Co.*, 6 Cal. App. 387, [92 Pac. 326]; *Silva v. Hawn*, 10 Cal. App. 544, [102 Pac. 952]; *Hesperia etc. v. Rogers*, 83 Cal. 10, [23 Pac. 196], and many other decisions.

It is true that in the cross-examination of the witness he qualified his testimony by stating that it did not apply to the year 1917, so that, if there were no other testimony of a similar nature extending over a sufficient period in 1917 to complete the five years, it might be said that the time was too short. But one A. K. Sweet testified, among other things, as follows: "During the year 1917 I have been running the land formerly owned by Bush and now by Miss Lester, and I have used water from South Deep Creek this year. Had

two-thirds of it, as near as I could guess, and Husa took over the other one-third for the Bush lands, that is, the Dodson land. Raymond Turner was using water from South Deep Creek this year some time about the first of June. I think it was the first day of June it was turned on. I turned it all away." W. A. Husa testified that for three years he had been living on the Dodson land and "during the times that I have been there Mickle took two-thirds of the water and I took one-third. He took two-thirds of the water to his place and the Bush place and I took the other one-third to the Dodson place."

We may add that there is further evidence in the record that the use of said water by plaintiffs was permissive and that defendants used it as if it belonged to them, and since there is no controversy as to the payment of the taxes, we are satisfied that there is legal justification for the conclusion that defendants and their predecessors in interest used all the water continuously, openly, and under a claim of right for at least five years and, therefore, acquired a title by prescription.

The judgment and order are, therefore, affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 17, 1919.

All the Justices, except Olney, J., concurred.

[Civ. No. 1991. Third Appellate District.—September 20, 1919.]

TULARE COUNTY POWER COMPANY (a Corporation),
Respondent, v. **PACIFIC SURETY COMPANY (a Corporation),** Appellant.

- [1] **LIABILITY INSURANCE—ASSUMPTION OF CONTROL OF LITIGATION—WAIVER OF NOTICE OF ACCIDENT.**—The conditions of a liability insurance policy that “upon the occurrence of an accident, the assured shall give immediate written notice thereof with the fullest information obtainable at the time,” being intended primarily to afford opportunity to the insurer promptly to take charge of a defense, are waived where the insurer does assume control of the litigation growing out of the accident.
- [2] **ID.—ASSUMPTION OF CONTROL BY INSURED—AFFIRMANCE OF JUDGMENT ON APPEAL—VIOLATION OF POLICY.**—It cannot be said that the insured violated a condition of the policy by taking complete control of the motion for a new trial in an action brought against it for damages, where counsel for the insurer was present at and participated in the trial and the judgment in such action was affirmed on appeal.
- [3] **ID.—PARTIAL CONTROL BY INSURED—WANT OF INTERFERENCE—WAIVER OF BREACH.**—In the absence of some complaint that the attorneys for the insured, who had been permitted to take part in the case, interfered with the insurer’s conduct of the defense in the action for damages, the fact that the latter did not have full and exclusive control of the defense did not militate against the rule that by assuming such control they waived the prior breach of conditions by the insured.
- [4] **ID.—ACTION UPON POLICY—PERFORMANCE—WAIVER OF PERFORMANCE—CONSTRUCTION OF FINDINGS.**—Where, in an action upon a liability insurance policy, both the fact of performance of all the

1. Construction and effect of condition in employers’ liability insurance policy requiring insured to give insurer notice of accident, notes, 11 *Ann. Cas.* 258; *Ann. Cas.* 1914A, 271.

Delay in giving notice of claim under employers’ indemnity policy, notes, 38 *L. R. A. (N. S.)* 62; 47 *L. R. A. (N. S.)* 1213; *L. R. A.* 1918D, 445; *L. R. A.* 1918E, 114.

Waiver of provision in accident insurance policy requiring notice of injury or death to be given within certain time, note, *Ann. Cas.* 1917A, 114.

2. Validity and construction of provision in employers’ liability insurance contract giving insurer control of settlement, note, *Ann. Cas.* 1918C, 405.

conditions of the policy by the insured and the fact of waiver of performance of the conditions of the policy by the insurer, with the facts and circumstances constituting such waiver, are alleged in the complaint, a finding that plaintiff "performed all the conditions of said policy" may be considered as surplusage, if the evidence justifies the further finding of waiver on the part of defendant. The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment.

- [5] **ID.—ACCIDENT DURING LIFE OF POLICY.**—Where the accident in question happened during the period of the policy it was immaterial that the installation of the wires which caused the accident occurred two months prior to the issuance of the policy, or that the insurer may not have learned of the date of installation of the plant until after the trial of the action growing out of the accident.
- [6] **ID.—PAYMENT OF JUDGMENT.**—The judgment against the insured having become final and a lien upon its property, the payment thereof partly by the insured personally and the balance by the purchaser of its property, who withheld the amount paid from the purchase price, constituted payment within the provision of the policy that "No action shall lie against the company for any recovery under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue."
- [7] **ID.—CONSTRUCTION OF POLICY.**—A contract of indemnity is to be strictly construed, and the contract of indemnity measures the rights of the parties thereto, and consequently, the liability of the indemnitor.
- [8] **ID.—INTEREST ACCRUING PENDING APPEAL—RECOVERY BY INSURER.** Interest on the judgment recovered against the insured from the date of its entry and pending an appeal therefrom does not constitute "expense" incurred in defending the action, or "costs," within the meaning of the provision in a liability insurance policy that, in the event of any suit brought against the assured to enforce a claim for damages covered by the policy, the insurer "will defend such suit, whether groundless or not, in the name and on behalf of the insured," and that "the expense incurred by the company in defending such suit, including costs, if any, taxed against the assured, will be borne by the company whether the judgment is for or against the assured."
- [9] **ID.—INTEREST RECOVERABLE.**—An insured who pays a judgment for the full amount limited in a liability policy indemnifying against actual loss, or a judgment for a smaller amount than such limited sum, can recover the sum with interest only from the time of such payment.

- [10] **ID.—RECOVERY OF ATTORNEYS' FEES.**—The insured is not entitled to recover attorneys' fees paid to its counsel where the insurer notified the insured that it would defend the action, and did defend it, and the participation therein by the insured's attorneys was by the insurer's permission and was not required by the terms of the policy.
- [11] **ID.—VENUE OF ACTION.**—In this action upon a liability insurance policy, the court having found from the facts set forth in the affidavit filed by plaintiff that the contract was made in Tulare County and was to be performed therein, and the business of plaintiff having been conducted in that county and the liability of the defendant under the policy having arisen therein, the court properly denied the defendant's motion for a change of venue to the county where it maintained its principal place of business.

APPEAL from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge. Affirmed.

The facts are stated in the opinion of the court.

Denson, Cooley & Denson and Cooley & Lachmund for Appellant.

Middlecoff & Feemster for Respondent.

Chickering & Gregory, Lilienthal, McKinstry, Raymond, Haber & Firebaugh and Redman & Alexander, *Amici Curiae*.

HART, J.—The action was brought by plaintiff to recover upon a liability insurance policy, issued by defendant, dated June 18, 1913. Judgment was entered in favor of plaintiff for \$5,460, with interest and costs, from which judgment defendant prosecutes this appeal.

From the allegations of the complaint it appears that plaintiff was a California corporation doing business in the county of Tulare and "between noon on the sixteenth day of June, 1913, and noon on the sixteenth day of June, 1914, was engaged in the business of operating and maintaining an electric light and power plant" in said county, together with extension lines and service connections, etc. "That on said eighteenth day of June, 1913, said defendant made its contractor's public liability policy of accident insurance," a copy of which was attached to and made part of the complaint, to portions of which we shall hereinafter refer. It was further alleged and

found that, "on the eighteenth day of June, 1913, said defendant delivered said policy of insurance to this plaintiff, and plaintiff paid the full amount of the premium provided for in said policy of insurance, to said defendant." It was found that said premium was paid to defendant on or about the third day of January, 1914, "and defendant waived the payment thereof prior to such time and waived any defense it had to said policy by reason of said premium not being paid prior to the time it was so paid."

On the tenth day of July, 1913, one L. C. Bergen was being furnished for hire by plaintiff with electricity for lighting and power on certain property in Tulare county and "in order to use said power said L. C. Bergen maintained on said lots a well for irrigating purposes, and an electric motor and pump and pump-house"; that plaintiff had erected along the south line of said premises a line of poles and a system of wires known as "primary" wires, "charged with a dangerous and life-destroying force and current of electricity, . . . to wit: six thousand six hundred volts"; that the motor was to be operated by 220 volts and the lights by 110 volts; that, to reduce said six thousand six hundred volts to 220 and 110 volts, respectively, transformers and ground wires were "supplied, furnished, installed and erected at said pumping plant" by plaintiff, the system of wires, switches, etc., being known as "secondary" wires. On said 10th of July, 1913, said Bergen descended into the pit in which said pump was located for the purpose of inspecting said pumping plant; at that time "there was a dangerous, unusual, and excessive current of electricity passing from said 'primary' wires and into the drop cord and electric light which hung in the pit of said pumping plant, . . . rendering said drop wire and electric light highly dangerous to handle, and that this dangerous condition was at said time unknown to said Bergen and unknown to this plaintiff." Bergen came in contact with the drop wire and light and was instantly killed, without any fault on his part.

It was alleged in the complaint and found by the court that "upon the occurrence of said accident, and as soon thereafter as plaintiff was informed that a claim was made against plaintiff on account of said accident, plaintiff did, to wit, on the sixteenth day of September, 1913, give immediate

written notice thereof with the fullest information obtainable at the time to the defendant's head office at San Francisco; and at the same time by the said notice gave like notice of the making of said claim on account of said accident." The notice above referred to was in the form of a letter, signed by Drew & Drew, Attorneys, Fresno, addressed to the defendant at San Francisco, and read as follows: "You are hereby notified that on September 3rd, 1913, Mrs. Sarah E. Bergen, as administratrix of the estate of L. C. Bergen, deceased, has through her attorneys . . . made a claim against the Tulare County Power Company (assured under policies Nos. C. P. 2347 and C. E. 4212), for and on behalf of herself and the minor children of said deceased [naming them] for the death of said L. C. Bergen, claiming that the death of said deceased was caused by coming in contact with a drop cord in the pit of the pumping plant belonging to the deceased. The attorneys have not made claim for any particular amount. We are serving this notice on your company under the provisions of your policy. Mr. Bergen met his death some time in July, but this is the first direct intimation that we have of any claim against the company for his death." On September 17, 1913, the defendant replied to the above letter as follows: "You are hereby advised that the above policies have been canceled upon the books of this company by reason of the nonpayment of premiums thereunder and that the same have been void and of no effect from date of issue."

On December 8, 1913, Sarah E. Bergen, as administratrix of the estate of L. C. Bergen, deceased, commenced an action against plaintiff, in the superior court of the county of Tulare, in which she asked for fifty thousand dollars damages on account of the death of her husband. Summons was duly issued and a copy of the complaint and summons was served on plaintiff and, on December 11, 1913, plaintiff forwarded to defendant, at San Francisco, said summons and complaint. On December 27, 1913, defendant wrote the following letter to Messrs. Holley & Holley, Visalia: "In Rel: L. C. Bergen vs. Tulare County Power Co. Our Mr. W. B. Renton has made a thorough investigation of the facts surrounding the nonpayment of premium in this case and this office is in receipt of his report thereon, in view of which this company will, upon receipt of the Tulare County

Power Company's check for earned premium in the amount of \$572.08 due from 6/16/13 to 9/16/13, be pleased to reinstate this policy without prejudice. We enclose bill for this amount. For this purpose, we will ask you to have assured return to us at once the papers in the case." On December 29, 1913, Holley & Holley wrote plaintiff as follows: "I have received a letter from the Pacific Surety Company this morning offering to reinstate the liability policies in that company which were written and effective June 16th, 1913, and which were canceled for nonpayment, upon the payment of the earned premium from June 16th to September 16th. As I understand it, this contemplates the assumption of all liability under these policies from the date of their issuance, including the case of L. C. Bergen vs. your Company which has been filed for action, on which case the Pacific Surety Company formerly denied liability. . . . You will understand that if you accept the proposition, you will be relieved of all expense in connection with the defense of this case of Bergen's." Upon receipt of said last-mentioned letter, plaintiff paid to defendant the amount of premium demanded by it. On March 3, 1914, defendant wrote plaintiff: "This letter will serve to notify you that policy No. C. P. 2374, issued to you on June 16th, 1913, and subsequently canceled, has been reinstated as of the date of issue, and is in full force and effect."

It was then found that thereupon plaintiff rendered to defendant all assistance in plaintiff's power in the protection of its interest; that defendant, in the name of plaintiff and on its behalf, filed an answer to the Bergen complaint; that a trial of said action was had and judgment was given therein in favor of the administratrix for the sum of twelve thousand five hundred dollars and \$160 costs. Further facts, appearing from the record, will be adverted to in the discussion of the points raised upon the appeal.

[1] 1. It is first contended by appellant that plaintiff failed to perform the first condition of the policy, namely: "Upon the occurrence of an accident, the assured shall give immediate written notice thereof with the fullest information obtainable at the time," and that plaintiff failed to give immediate notice of the claim "with full particulars," as required by the policy.

The court found "that the defendant waived any defense which it had herein by reason of the failure and neglect of said plaintiff to give immediate written notice of said accident."

We think this point is disposed of in favor of plaintiff by the case of *J. Frank & Co. v. New Amsterdam C. Co.*, 175 Cal. 293, where it is said, on page 298, [165 Pac. 927, 930]: "Of course the conditions of the policy requiring notice to the home office of probable liability are intended primarily to afford opportunity to the insurer promptly to take charge of a defense. Such requirements are reasonable and just, but they are waived when, as in this case, the insurer actually does assume control of the litigation growing out of the accident."

[2] 2. It is claimed "that plaintiff violated condition 2 of the policy, in that it took complete control of one of the legal proceedings in the Bergen litigation, namely, the motion for new trial, and did not even notify us of the date of the hearing of the motion."

The following facts were stipulated to by the respective parties at the trial: "That at the time of hearing of the motion for new trial in the Bergen case, Denson, Cooley & Denson, E. I. Feemster, and A. E. Cooley were acting as attorneys on behalf of the defendant in said action, and that no notice of the time of said hearing was given by said E. I. Feemster, to Denson, Cooley & Denson or to A. E. Cooley, and that neither Denson, Cooley & Denson nor A. E. Cooley took part in the argument of said motion for new trial, but said motion for new trial was argued for the defendant in said action solely by said E. I. Feemster; that the reason that E. I. Feemster did not notify Denson, Cooley & Denson or A. E. Cooley of the time set for the hearing of said motion for new trial, was that he believed it would be a useless tax upon the time of said A. E. Cooley to go to Visalia from San Francisco for that purpose, and that said E. I. Feemster believed that the trial court would refuse the motion for new trial and pass the matter up to the appellate court for decision."

As seen, the action of *Bergen v. Tulare County Power Company* was commenced on December 8, 1913, and the summons and complaint were sent to the Surety Company on December 11th. Between that date and the 27th of December,

defendant was denying any liability on account of the death of Bergen. Before the date when the defendant announced that it would defend the action, the Power Company had appeared therein and filed a demurrer to the complaint. On January 17, 1914, Denson, Cooley & Denson of San Francisco, by A. E. Cooley, wrote to Feemster & Walker, at Visalia, the attorneys for the Power Company, suggesting that an amended demurrer to the complaint be filed, and stating: "We shall be glad to co-operate in every manner in the defense of this action." An amended demurrer was filed and overruled and an answer was filed on behalf of the defendant by "Feemster & Walker, Denson, Cooley & Denson, attorneys for defendant." Mr. Cooley was present and participated in the trial, and the decision of the supreme court (173 Cal. 709, [161 Pac. 269]) shows him to have been one of the attorneys for the appellant on the appeal.

In *Williams v. Harter*, 121 Cal. 47, 52, [53 Pac. 405], the appellant made the point that the trial court arbitrarily denied his motion for a new trial without hearing or considering the grounds urged in support thereof. The supreme court refused to consider the point because not properly brought before it, but said: "Besides, the real and only question is, Did the court err in denying the motion?"

The supreme court having affirmed the judgment in the Bergen case, we think, under the authority of the above-cited case, that it becomes immaterial whether Denson, Cooley & Denson were notified of the date set for the hearing of the motion for new trial.

3. It is next urged that "no waiver of breach of conditions was proved, and none could have been under a complaint alleging due performance by plaintiff of all conditions of the policy."

In this connection, the allegations of the complaint, which the court found to be true, were: "And this plaintiff has duly performed all the conditions of said policy of insurance upon its part to be performed. That defendant herein through its own attorneys and counselors at law controlled all said legal proceedings, and had charge of the trial of said action, and tried the same. And this plaintiff alleges that by reason of the facts herein alleged the defendant waived and excused any further notice of said accident, and waived any and all defenses it might have had herein."

In *J. Frank & Co. v. New Amsterdam C. Co.*, *supra*, it is stated in a syllabus: "When an insurance company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived."

In *Rodgers v. Pacific Coast Casualty Co.*, 33 Cal. App. 70, [164 Pac. 1115], it was also held that "where an insurance company . . . takes charge of and assumes exclusive control of an action brought against the insured for damages for injuries from . . . an accident, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment not exceeding the amount stipulated in the policy."

[3] Appellant attempts to distinguish those cases from the one at bar because here the insurance company did not have, while in the cited cases it did have, "full and exclusive control" of the litigation. In the Frank case the attorney for the insurance company invited the attorney for the insured to participate in the preparation and trial of the case, but he refused to do so. In the present case, Mr. Cooley, in the letter to plaintiff's attorneys suggesting that an amended demurrer to the complaint be filed, wrote: "Inasmuch as the plaintiff has sued for very much more than the policy limit of the Pacific Surety Company, we presume the defendant will want to employ its own attorneys to represent it in the trial of the action. This is customary, and permission is always granted by the Pacific Surety Company to the assured to do so." The attorneys for the Power Company consented to act and thereafter did act in conjunction with the attorneys for the Surety Company in the conduct of the case. Aside from the matter of the argument of the motion for new trial, appellant makes no claim that plaintiff's attorneys interfered with their conduct of the defense in the Bergen case. While appellant's attorneys may not have had "full and exclusive control" thereof, the absence of any complaint that the defense was interfered with by plaintiff's attorneys would seem to indicate that the point now made is without merit.

Appellant cites *Todd v. Union Cas. & Surety Co.*, 70 App. Div. 52, [74 N. Y. Supp. 1062], wherein it is stated: "If he [the plaintiff] has performed, then that fact must be alleged

without qualification. If he has not performed, for the reason that defendant waives performance, then the conditions waived and the facts and circumstances constituting such waiver must be alleged." *Peek v. Stienberg*, 163 Cal. 127, 133, [124 Pac. 834], is also cited to the same effect. [4] As seen, in the present case, both the fact of performance and the fact of waiver, "with the facts and circumstances constituting such waiver," were alleged.

"The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment." (*Haller v. Yolo Water & Power Co.*, 34 Cal. App. 317, [167 Pac. 197].) The finding that plaintiff "performed all the conditions of said policy" may be considered as surplusage, as the evidence fully justifies the further finding of waiver on the part of defendant, and this disposes of the further contention of appellant that said findings are inconsistent.

4. Appellant complains that the finding that "Feemster & Walker, Denson, Cooley & Denson, and Chas. E. Bush, Esq., were all acting as the legal representatives of both said Tulare County Power Company and Pacific Surety Company and were co-operating in the defense of said action under the terms of said insurance policy," is inconsistent with the further finding that E. L. Feemster, in making the motion for new trial, "was representing the Pacific Surety Company, and not the Tulare County Power Company."

We cannot see that these findings are inconsistent, but if it be conceded that they are, we do not perceive how any harm could have resulted to the defendant therefrom.

5. The point is made that there is no evidence supporting certain of the findings essential to the support of the judgment. The findings referred to we have already considered in connection with the consideration of other points urged as grounds upon which a reversal of the judgment should be ordered. We will not enter herein upon an analytical examination of the evidence for the purpose of showing, as easily it may thus be shown, that there is no merit in this point. It is enough to say that there is but one of the findings of which it is asserted that there is no evidence to support them which might justly be held to be amenable to that criticism, and that finding is the one to the effect that plaintiff had performed all the conditions of said insurance policy

imposed upon it; but as to that finding it is, as above suggested, immaterial whether it does or does not derive support from the evidence, since the court also found, upon ample evidence, that the defendant had waived any breach of any of the conditions of the insurance policy of which the plaintiff might have been guilty and also waived any defense which might have been based upon any such breach.

[5] 6. It is next argued that "the policy did not cover this accident because no premium was received based upon the compensation paid the employees of plaintiff who negligently installed the Bergen plant."

The argument is that the installation of the wires on the Bergen plant "was made three months prior to the accident and the premium was based upon the pay-roll from June 16, 1913; . . . that none of the compensation paid prior to the issuance of the policy entered into the computation of the premium. No consideration passed from plaintiff to defendant to cover insurance for negligence occurring prior to the issuance of the policy."

The policy agreed to indemnify the assured "against loss or expense arising or resulting from claims upon the assured for damages on account of bodily injuries, including death therefrom, accidentally suffered, or alleged to have been suffered, during the period of this policy, by any person or persons not employed by the assured by reason of the operation of the business described in the schedule . . . when such injuries or death result from accident occurring within the period hereinafter mentioned."

The accident in question happened "during the period of this policy," and we think it entirely immaterial that the installation of the wires which caused the accident occurred two months prior to the issuance of the policy. Nor is it material that defendant, as is the claim, may not have learned of the date of the installation of the plant until after the trial of the Bergen case. The fact, if known to the defendant before the trial, could not have excused the Power Company from liability for the accident and could have availed defendant nothing, because its liability was for accidents occurring during the life of the policy.

[6] 7. Section 3 of the policy reads as follows: "No action shall lie against the company for any recovery under this policy, unless it shall be brought by the assured for loss

or expense actually sustained and paid in money by the assured in satisfaction of a judgment after actual trial of the issue, nor unless such action be brought within one year after such payment."

There was introduced in evidence an agreement, of date June 30, 1915, between Tulare County Power Company and Mt. Whitney Power & Electric Company, supplemented by an agreement of August 2, 1915, whereby said Mt. Whitney Company purchased the properties of the Tulare County Power Company, and wherein it was recited that the judgment in the Bergen case was a lien upon said properties and that the balance due the Tulare Company under said agreement of sale should not be paid by the Mt. Whitney Company until said judgment and lien had been fully satisfied of record.

It appeared that the Mt. Whitney Company paid fourteen thousand dollars of the Bergen judgment and the Tulare Company paid \$1,036.10 thereof. It is claimed by appellant that this payment by the latter company does not constitute the payment provided in said section 3 of the policy.

Appellant cites *Philadelphia Pickling Co. v. Maryland Casualty Co.*, 89 N. J. L. 330, [98 Atl. 433]. There a policy of insurance was issued by the defendant to "Philadelphia Pickling Co.," which was in reality Sallie Wittenberg, she having adopted that trade name. One Chambers, an employee, was injured in the assured's factory and brought suit and recovered judgment. After the verdict and before final judgment, Sallie Wittenberg transferred her business to the plaintiff, Philadelphia Pickling Co., a corporation, which took over the assets and assumed the liabilities of the trade name, including the Chambers claim. The policy was attempted to be passed by a parol transfer and delivery, but at the time of the incorporation of the plaintiff the policy had expired. The corporation paid the Chambers judgment and brought the action against the surety company to recover the money paid. Said the court: "Clearly, the appellant cannot recover as the assured under the policy. The difficulty, however, is this: Sallie Wittenberg never suffered any loss. She never paid any money. The money that was paid was paid by the present appellant, the Philadelphia Pickling Company, Incorporated. . . . There was no loss under the

policy. While it is true Sallie Wittenberg had assigned her cause of action, she could not assign any loss, for she had already had that loss made good to her by the Philadelphia Pickling Company, not by way of indemnity, but as a part of the purchase price of the property."

The facts in the case at bar differ from those in the above case in the following particulars: The assured here did suffer loss; there was loss under the policy; the assured did not assign its cause of action, but itself prosecuted the suit. The check of the Mt. Whitney Company for fourteen thousand dollars was drawn to the order of plaintiff and bore the endorsement that it was in full satisfaction of the Bergen lien. This check, together with one of the plaintiff for \$1,036.10, was delivered to the county clerk and by him to Mrs. Bergen. It is said, in *J. Frank & Co. v. New Amsterdam C. Co.*, *supra*: "It is therefore immaterial to the insurance carrier how or when that corporation [plaintiff] obtained the money or the credit which enabled it to pay Cousins [judgment creditor] the amount due." And it was said, in *Rodgers v. Pacific Coast Casualty Co.*, *supra*, that when the judgment against the assured became final, the liability of the insurer became fixed, and it would have been competent for the assured to assign her claim against the insurer to the judgment creditor in satisfaction of the judgment.

We can see no merit in the point under discussion.

8. Appellant contends that the court erred in allowing interest from the date of the entry of the Bergen judgment and in allowing plaintiff's attorneys' fees.

This contention must be sustained. [7] A contract of indemnity is to be strictly construed, and the contract of indemnity measures the rights of the parties thereto, and consequently, the liability of the indemnitor. The defendant here agreed to indemnify the plaintiff "against loss or expense arising or resulting from claims upon the assured for damages," etc., to the extent of five thousand dollars in the case of bodily injuries or death to one person, etc. In addition, the indemnitor agreed that, in the event of any suit brought against the assured to enforce a claim for damages covered by the policy, it "will defend such suit, whether groundless or not, in the name and on behalf of the insured," and that "the expenses incurred by the company in defending such suit, including costs, if any, taxed against the assured,

will be borne by the company whether the judgment is for or against the assured."

[8] It is claimed by the respondent that interest upon the judgment is a part of the costs or expenses of the litigation. But this cannot be so. The "costs" referred to in the contract of indemnity refer to the costs of defending the suit for the recovery of damages against the assured, and certainly it cannot reasonably be said that interest on the judgment recovered against the assured is any part of the cost necessarily incurred or to be incurred in defending the action in which said judgment was obtained. As stated, the assured is bound by the limitation as to reimbursement prescribed by the contract of indemnity, and obviously the allowance of interest on the judgment from the date of its entry and pending the appeal therefrom would result in extending the liability of the indemnitor beyond the amount to which the contract of indemnity expressly limits such liability. This conclusion as to interest is supported by the cases generally.

In *Maryland Casualty Co. v. Omaha Electric L. & P. Co.*, 157 Fed. 514, 519, [85 C. C. A. 106], the United States circuit court of appeals of the eighth district, considering the precise point under discussion in an action on bond such as the one involved herein, said: "Is the interest accrued after the original judgment was rendered, and pending the appeal to the supreme court, an expense or outlay incident to defending the suit, and when paid by the assured does it constitute a loss within the meaning of the policy? In answering this question we must not forget that the matter resides in the domain of contract, and that the contract measures the rights of the parties. They agreed that defendant's limit of liability should be five thousand dollars, except as it might be increased by failure on its part to pay the costs of making the defense. The interest, in our opinion, is not a part of such cost. It may be remotely related to the delay occasioned by making a defense, in that if no appeal had been prosecuted and no *supersedeas* secured, the judgment as an indirect result would probably have been paid and no interest would have accrued. But this is a forced and unnatural view to take. An agreement to pay the cost of making a defense in the common and well-understood acceptance of the term fairly and reasonably contemplates the attorney's fees, court costs, stenographer's fees, and other

expenditures, necessary and directly required to present the defense, and does not include the collateral and indirect results of doing so." (See, also, *Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co.*, 240 Fed. 36, [153 C. C. A. 72, 77]; *Davison v. Maryland Casualty Co.*, 197 Mass. 167, [83 N. E. 407]; *Munro v. Maryland Casualty Co.*, 48 Misc. Rep. 183, [96 N. Y. Supp. 705]; *National & Providence Worsted Mills v. Frankfort Marine & Plate Glass Ins. Co.*, 28 R. I. 126, [66 Atl. 58]; *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, [3 Ann. Cas. 478, 97 N. W. 686].)

[9] The sum of the rule as to interest in such cases is this: That an assured who pays a judgment for the full amount limited in a liability policy indemnifying against actual loss, or a judgment for a smaller amount than such limited sum, can recover the sum with interest *only from the time of such payment*, but that interest accruing *on the judgment pending an appeal therefrom* is not an expense of defending the action. The case of *Saratoga Trap Rock Co. v. Standard Accident Ins. Co.*, 143 App. Div. 852, [128 N. Y. Supp. 822], sets forth and elaborately examines the reasons for the disallowance of interest upon a judgment pending an appeal therefrom or before the judgment has become final (which occurs only when the judgment has been affirmed by the appellate court) in a case, like the one involved herein, in which a security company has bound itself to indemnify the judgment debtor against loss by reason of such judgment. The case is an instructive one on the proposition, but it is not necessary to do more than refer to it herein.

Counsel for respondent declare that interest ought to be allowed upon the judgment for the reason that the defendant, by exercising its right of appeal in the Bergen case, delayed the payment of the judgment and thus permitted the interest to accumulate thereon. A similar position was taken in *Maryland Casualty Co. v. Omaha Electric L. & P. Co.*, 157 Fed. 514, [85 C. C. A. 106], and was disposed of by the court in said case as follows: "The argument of plaintiff's counsel that the defendant, by exercising its right of appeal, and by superseding the execution of the judgment pending that appeal, caused the accumulation of interest in question, and thereby created an additional charge against the plaintiff for which it should be held responsible as a loss to the plaintiff, is more specious than sound. The fallacy rests

in a failure to recognize the advantage which the appeal gave the plaintiff. By reason of it plaintiff was permitted to retain and use the five thousand dollars, which otherwise would have been paid out by it. The value of the use is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance in demanding it when due. Accordingly, the assured lost nothing by the delay occasioned by the appeal or by paying the interest which accumulated pending the appeal. The assured stood after paying the interest exactly as it would have stood if it had paid the judgment of five thousand dollars on January 3, 1902, when originally rendered. Nothing was lost by the appeal, as the interest ultimately paid was neutralized by the use and enjoyment of the money before that time."

The judgment in the Bergen case was rendered and entered on the twenty-third day of May, 1914, and was paid by the plaintiff herein on February 1, 1917. It follows that interest on the judgment between those dates is not recoverable by plaintiff.

[10] The attorneys' fee of \$250, awarded by the judgment to plaintiff's attorneys, should not be allowed. The fact is that the Surety Company notified plaintiff that it would defend the Bergen action and did defend it, and the participation therein by plaintiff's attorneys was by defendant's permission and was not required by the terms of the policy. Indeed, the evidence clearly enough shows that the part taken in said action by the attorneys for the plaintiff was wholly voluntary and gratuitous on their part. Moreover, in a letter of January 17, 1914, to Feemster & Walker, attorneys of the plaintiff, Mr. Cooley, one of defendant's attorneys, wrote that the expense of plaintiff's attorneys was "to be borne by the assured."

[11] 9. It is lastly contended that the court erred in denying defendants' motion for a change of venue.

The affidavits upon which the motion was made showed that defendant was a resident of and had its principal place of business in San Francisco; that the insurance policy was made and countersigned in San Francisco and was to be performed there; that it was customary amongst insurance companies to make payments to the persons insured at the home office, or principal office, of such companies.

Respondent contends that the action was properly tried in Tulare County, because the contract was made and was to be performed, the liability sued on arose and the breach occurred in said county. (Const., art. XII, sec. 16.)

Section 1626 of the Civil Code reads: "A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."

In answer to the affidavit made on behalf of defendant on the application to change the place of trial, H. H. Holley deposed as follows: "That at the time of the execution and delivery of the policy No. C. P. 2374, . . . affiant was the agent of defendant Pacific Surety Company, through whom said policy was solicited and delivered; that said policy was received by affiant in Visalia, Tulare County, by mail from the head office of said defendant, and affiant acting as the agent of defendant personally delivered said policy to said plaintiff in Tulare County; and during the time affiant was the agent of said defendant, it was the practice and custom of defendant to pay its losses occurring in Tulare County by sending drafts to affiant, as its local agent, and affiant would thereupon deliver said drafts personally to the beneficiaries of defendant's policies, who suffered losses."

It is true that a different state of facts was set up in the affidavits filed by defendant, but the court did not hold with it. Under the authority of *Ivey v. Kern County Land Co.*, 115 Cal. 196, 201, [46 Pac. 926], the court was justified in finding, from the facts set forth in the Holley affidavit, that the contract was made in Tulare County and was to be performed therein. The business of plaintiff was conducted in that county and the liability of the defendant under the policy arose therein.

The judgment should be modified by eliminating therefrom the sum of \$250, attorneys' fees, and the sum of \$1,017.80, interest on the sum of \$5,460 from May 23, 1914, to February 1, 1917, and, as so modified, the judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 17, 1919, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal of the third appellate district is denied.

In so far as the claim of interference by the respondent in the matter of the motion for new trial is concerned, we base our denial of a hearing in this court upon the finding of the trial court substantially to the effect that Mr. Feenster represented appellant, which we believe, under all the circumstances shown by the record, to be sufficiently supported by the evidence.

All the Justices concurred.

[Civ. No. 2034. Third Appellate District.—September 22, 1919.]

YOLO WATER AND POWER COMPANY (a Corporation),
Petitioner, v. **THE SUPERIOR COURT OF LAKE**
COUNTY et al., Respondents.

- [1] **PROHIBITION—PLEADING—SUFFICIENCY OF COMPLAINT.**—The question of the sufficiency of a complaint to state a cause of action cannot be tested on an application for a writ of prohibition. Its sufficiency as a pleading is to be determined by the court in which it is filed.
- [2] **INJUNCTION—MAGNITUDE OF INTERESTS INVOLVED—EFFECT ON POWERS OF TRIAL COURT.**—While the amount of damages that would accrue should a preliminary injunction be issued in a given case is a proper matter for the consideration of the lower court in exercising its discretion in granting or refusing to grant the temporary injunction, the size of the interest involved is not a factor in determining the power of such court to hear and decide the matter.
- [3] **ID.—EXISTENCE OF GOOD DEFENSE—JURISDICTION.**—The existence of facts constituting a good defense on the merits to an application for a writ of injunction does not oust the court in which such action is pending of the power to hear and decide the case.
- [4] **JURISDICTION—UNAUTHORIZED SUIT—REMEDY OF ONE AGGRIEVED.**—If the district attorney, or anyone else, brings an action that the law does not permit him to bring, the court in which it is brought has jurisdiction still to dispose of it. The proper procedure of the one aggrieved is by motion to dismiss, and not by application for a writ of prohibition.

- [5] **ID.—JURISDICTION OF SUPERIOR COURT—POWER OF LEGISLATURE TO TAKE AWAY.**—The jurisdiction of the superior court is conferred by the constitution and cannot be taken away by any act of the legislature. Jurisdiction is the power to hear and determine, and does not depend upon the regularity of its exercise, nor upon the rightfulness of the decision made by the court.
- [6] **ID.—INJUNCTION PROCEEDINGS AGAINST PUBLIC UTILITIES—EFFECT OF CONSTITUTIONAL PROVISIONS.**—The superior court has jurisdiction to hear and determine a suit brought in the name of the people against a public utility to enjoin it from committing a public nuisance. The equity powers of that court, as conferred by section 5 of article VI of the constitution, are not limited by the provisions of section 23 of article XII of the constitution, which states what are public utilities and provides for their control and regulation by the Railroad Commission.
- [7] **ID.—POWER OF RAILROAD COMMISSION TO AVAIL ITSELF OF COURT PROCESSES — NOT INCONSISTENT WITH RIGHT IN OTHERS.**—The powers conferred by the constitution upon the Railroad Commission to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law is not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against the public utilities. This express power to avail itself of court processes and writs was conferred upon the commission so that its power in this regard might not be questioned in any litigation.

APPLICATION for a Writ of Prohibition to prevent the Superior Court of Lake County and M. S. Sayre, Judge thereof, from proceeding to hear and determine a petition for an injunction. Writ denied.

The facts are stated in the opinion of the court.

C. E. McLaughlin, C. P. McLaughlin, Arthur C. Huston, R. B. McMillan and Theodore A. Bell for Petitioner.

H. B. Churchill and Robert Duncan for Respondents.

THE COURT.—The opinion filed in this matter on the seventh day of August, 1919, ruling upon the demurrer to the petition is vacated and set aside and the following opinion of the court in said matter is hereby substituted therefor:

The application is for a writ of prohibition to prevent said court and the judge thereof "from hearing, entertaining,

passing upon, proceeding with, trying and deciding" any and all matters and issues in a certain action pending in said court wherein the people of the state of California is plaintiff and the said Yolo Water and Power Company is defendant. The petition herein shows that said company constitutes a public utility, engaged in the sale, rental, and distribution of water for irrigation; that in pursuance of said purpose it is diverting and distributing the waters of Clear Lake flowing down Cache Creek for the irrigation of certain farming neighborhoods in the counties of Yolo, Colusa, and Solano, amounting to more than two hundred thousand acres; that said lands are owned by several hundred different proprietors and are planted and devoted to various agricultural products; that artificial irrigation is needed for the proper growth and maturity of these different crops; that there is no other source from which sufficient water can be obtained to irrigate these lands; that for the purpose of conserving, storing, and distributing said waters said petitioner has constructed a large concrete dam across Cache Creek, a natural outlet of said Clear Lake, at a point just where the waters of Clear Lake are discharged into said Cache Creek, and has incurred other expenses, in the aggregate of over two million dollars, for the improvement and development of its irrigation system, the acquisition of property and other purposes connected with the scheme for which the company was incorporated and is being operated.

It further appears that on the third day of July, 1919, the district attorney of Lake County filed a complaint in the superior court of said county in the name of the people of the state of California against petitioner, in which it alleged that the defendant therein has committed, and is about to commit, a public nuisance in taking said waters from said Clear Lake, and the plaintiff prayed for the issuance of a preliminary and, also, for a final injunction "restraining and enjoining said defendants from building any dam across the arm or slough of Clear Lake at the point where the pumps of said defendant are now located, or any other point in said arm or slough, and from dredging or deepening or widening said slough or arm of said lake, or from lowering Grigsby riffle at the end of said arm or slough, and from drawing off the waters of said lake any faster than the same would naturally flow therefrom." Notice was given

petitioner for the hearing of a motion for the issuance of said preliminary injunction on the eighteenth day of July, and it is alleged that said court and the judge thereof will proceed to hear, entertain, and determine said motion, and that, if said injunction be granted, the petitioner will be unable to carry on its business and will be unable to supply water for the irrigation of the lands within its system, resulting in the destruction of crops and entailing a loss thereby to the owners of over a million dollars.

It further appears that during the year 1918 the government of the United States, acting through its food commission, urged, advised, and requested many persons producing crops of rice to increase the acreage of land devoted to such production in order to supply the needs of the government of the United States and its allies in the war with Germany and other central powers; that in pursuance of said advice more than ten thousand acres of land subject to irrigation from petitioner's system were planted in rice with the understanding that said food commission would take all necessary steps to secure water for the irrigation of said lands, and to this end, at the instance of said food commission, the Railroad Commission of the state of California directed and permitted petitioner to install a pumping plant and system which would enable it to pump water from Clear Lake to its canals, ditches, aqueducts, and other utilities for the purpose of supplying sufficient water for the irrigation of said ten thousand acres of rice to such an extent that the level of said lake would be and was reduced to more than 1.9 feet below the low-water mark thereof; that as a result of this reduction it became necessary to refill said lake to the ordinary low-water mark before any water would, without pumping, be available for distribution and sale to said persons during the irrigation season of 1919. It further appears that this would have been supplied by the ordinary rainfall if the seasons had been normal, but that in consequence of the unusual lack of rain in the years 1917, 1918, and 1919, it was necessary for petitioner to use pumps to supply the water for the irrigation of said lands and thereby lower the surface of the lake about twelve inches below the low-water mark of said lake. It further appears that at the time the owners of the land devoted to rice culture were preparing their lands for planting rice, it was believed that there would

be sufficient water to supply petitioner's system during the year 1919 without the necessity of resorting to pumping from said lake, but after said persons had made preparation to plant they were advised and informed that there would not be sufficient water to irrigate the rice without pumping, and thereupon said persons consulted and conferred with the Railroad Commission and with petitioner, and said Railroad Commission issued a letter permitting and directing said petitioner to pump water from said Clear Lake during the year 1919 for irrigation of said land, should such pumping become necessary in order to irrigate and mature crops on the lands supplied with water from the system of petitioner, and they also conferred with the board of supervisors of Lake County, and the members thereof, and were informed and lead to believe that there would be no objection to, nor interference with, pumping water necessary to mature and irrigate their crop during the year 1919.

The foregoing recital of the allegations of the petition herein, though not complete, is deemed sufficient to point the application of the legal principles upon which the parties hereto rely. It may be stated that the questions for our determination arise from said petition and a general demurrer thereto.

An opinion was filed by this court and an order entered overruling the demurrer to the petition and directing that an alternative writ issue returnable before this court on the fifteenth day of September, 1919. In the meantime respondents filed a petition for a rehearing, which was denied. In the opinion filed denying the petition for a rehearing, we said:

"The order made in overruling the demurrer is obviously not a final judgment in the case and respondents will have an opportunity, upon the return of the alternative writ, not only to traverse any and all allegations of the petition, but also to present whatever views they may desire upon the sufficiency of the petition itself. We assure respondents that the whole matter will be re-examined in the light of all the reasons and authorities that may be presented by counsel on both sides."

The case now stands submitted for final consideration and decision and we avail ourselves of the opportunity to re-examine the entire controversy. Before proceeding to a

discussion of the merits of the case it is deemed proper to dispose of some matters that seem to be collateral to the real issues involved.

1. In the argument of counsel for petitioner much space is occupied in an analysis of the allegations of the complaint filed in the superior court of Lake County, the object apparently being to show that it does not contain sufficient facts as the basis for equitable relief.

[1] The question of the sufficiency of the complaint to state a cause of action cannot be tested on an application for a writ of prohibition. Its sufficiency as a pleading is to be determined by the court in which it is filed.

[2] 2. The amount of damages that would accrue to petitioners and to the land owners it is serving with water, should a preliminary injunction be issued, is a proper matter for the consideration of the lower court in exercising its discretion in granting or refusing to grant the temporary injunction, and, doubtless, will be given its full and proper weight and force in reaching a decision, but the size of the interest involved is not a factor in determining the power of the superior court to hear and decide.

3. It is alleged in the petition that the Railroad Commission authorized the petitioner to do the very acts of which plaintiff is now complaining, and it is argued that a public nuisance cannot exist in acts that are warranted by law, and, therefore, petitioner should have the writ asked for.

If it be true in fact that the Railroad Commission authorized the acts complained of, and if it be the law that such authorization prevents the acts from becoming a nuisance, then petitioner has a good defense to be presented in the superior court.

As to whether the Railroad Commission could lawfully authorize the acts to be done and whether such authorization would be a defense, we neither express nor intimate any opinion. All we decide is that these are matters for the consideration of the superior court, uninfluenced by any expression in this opinion.

[3] The existence of facts constituting a good defense on the merits to an application for a writ of injunction does not oust such court of the power to hear and decide the case. With these matters disposed of, we now address ourselves to the merits of the case.

I.

The real gravamen of the petitioner's complaint is not that the superior court of Lake County has not equity jurisdiction to hear and decide an injunction suit against a public utility, but that the district attorney has no power conferred upon him by law to institute the action. This is apparent from the opening sentence of his written argument, wherein he says: "Petitioner earnestly insists that section 751 of the Code of Civil Procedure and section 4156 of the Political Code, giving the district attorney of a county power to commence an action in the name of the state of California to abate a public nuisance, were repealed, as far as public utilities are concerned, by section 23, article XII, of the constitution as amended in 1911 and 1914 and the Public Utility Act of 1911 and 1915."

The power of the district attorney to commence an action, and the power of the court to dispose of it after it has been begun, are entirely distinct matters, and to mingle them in the discussion but leads to confusion of thought. A law taking away from a party the power to start a suit is not a law diminishing the powers conferred upon the court by the constitution and cannot possibly have that effect. [4] If the district attorney, or anyone else, brings an action that the law does not permit him to bring, the court in which it is brought has jurisdiction still to dispose of it, and anyone aggrieved has his proper remedy in the court in which it is pending by motion to dismiss. This has always been recognized as the proper procedure instead of applying for a writ of prohibition.

Thus, in *People v. Stratton*, 25 Cal. 242, the attorney-general of the state brought a suit to have declared void certain patents granted by the Governor of the state to the defendants. The defendants, believing that the attorney-general was not authorized to institute such action, made a motion to dismiss the same upon that ground. The motion was granted by the district court and an appeal taken therefrom to the supreme court. This seems throughout to be recognized as the proper practice in a case where it is claimed the law did not authorize the plaintiff to bring the action.

In *Bishop v. Superior Court*, 87 Cal. 233, [25 Pac. 437], the court said: "Upon this proposition, the case of *State v.*

Valliant, 100 Mo. 59, [13 S. W. 398], seems to be much in point. We quote the statement as to what the case was, and as to what the court said on the subject, from petitioner's reply brief: 'A certain railroad company sought to condemn part of the track of another, by proceedings taken in the circuit court of St. Louis. The defendant company applied for a writ of prohibition, on the ground that the statutes and ordinances of St. Louis did not authorize the exercise of jurisdiction in eminent domain there invoked in favor of the company invoking it.' Upon the application for prohibition, the court held 'that the circuit court of St. Louis had jurisdiction of the proceedings to appropriate property to public use, in the exercise of the right of eminent domain, in a proper case, is unquestioned and unquestionable; but the substance of the petitioner's contention here, as well as the ground on which they, as defendants, resisted the proceedings in the circuit court, is that the statutes and ordinances do not authorize the exercise of such jurisdiction in behalf of the Southern Railroad Company. We are of the opinion that the question thus raised is not a proper one for our decision upon this application.' "

II.

"Has the superior court of the state jurisdiction to hear and determine a suit brought in the name of the people of the state of California against a public utility to enjoin it from committing a public nuisance, said suit being instituted by the district attorney of the county at the request of the board of supervisors thereof?"

[5] "The jurisdiction of the superior court is conferred by the constitution and cannot be taken away by any act of the legislature." (*City of Tulare v. Hearne*, 126 Cal. 226, [58 Pac. 530].) "The jurisdiction of any court is the power to hear and determine, and does not depend upon the regularity of its exercise, nor upon the rightfulness of the decisions made by the court." (*Lange v. Superior Court*, 11 Cal. App. 1, [103 Pac. 908].) The constitution of California, in section 5 of article VI, provides: "The superior court shall have original jurisdiction in *all* cases in equity."

The suit pending in the superior court of Lake County against the petitioner for an injunction is a suit in equity, and that court has jurisdiction to hear and determine it,

unless it has been divested of such jurisdiction by some provision of the state constitution.

[6] Petitioner claims that the power of the superior court to hear and determine this particular suit against a public utility has been taken away from it by virtue of certain provisions found in section 23 of article XII of the state constitution and of section 75 of the Public Utility Act, [Stats. 1915, p. 115].

Section 23 of article XII of the constitution states what are public utilities, and is broad enough to embrace petitioner, and as to such declares them to be "subject to such control and regulation by the Railroad Commission as may be provided by the legislature," and it further provides: "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California . . . as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution. From and after the passage by the legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, . . . in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission."

We discover nothing in this constitutional provision that limits in any way the equity powers of the court as conferred by section 5 of article VI of the constitution.

The phrase "all powers respecting public utilities vested in boards of supervisors or other governing bodies shall cease so far as such powers conflict with the powers conferred upon the Railroad Commission" does not purport to nor does it lessen the jurisdiction of the court to hear and determine this injunction suit. Courts are not "governing bodies" of counties within the sense in which that term is used in the constitution, nor are they classed as "bodies." The section of the constitution declares that "the right of the legislature to confer additional powers upon the Railroad Commission is plenary and unlimited by any provision of the constitution."

In pursuance of the powers given to it by section 23 of article XII, the legislature passed a Public Utility Act, and section 75 of this act provides that if a public utility is doing or about to do anything contrary to law, or any rule or requirement of the commission, it shall direct the attorney of the commission to commence an action in the proper court, in the name of the people of the state, for the purpose of having such violation or threatened violation stopped or prevented either by *mandamus* or injunction.

It is claimed that this section gives the commission the right and power to bring suits for injunction against public utilities, and that such power so vested in it is inconsistent with the power of a county to institute such suit. With this conclusion we are unable to agree. The purpose and intent in enacting section 75 is obvious.

[7] The Public Utility Act invests the board of railroad commissioners with large powers in the control of public utilities, and gives it power to fine and punish for contempt. But the commission is not a court and has not complete court machinery. It was seen that cases might arise where punishments for contempt and fine would not accomplish the objects sought, that writs of *mandamus* and injunction might be needed, and such writs the commission had no power to issue. It might become necessary for it to avail itself of the equity powers of the courts. Without express authority granted by the legislature to so do, the question of its right to bring suit might be raised in any litigation arising. Anticipating such contingency, express power was conferred upon the commission to avail itself of court processes and writs, so that its power in this regard might not be questioned. This grant of a right to the commission to bring injunction suits is not at all inconsistent with the continuance of said right in others who may feel aggrieved by the acts of a public utility.

Powers conferred by the constitution upon the Railroad Commission to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law is not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against public utilities. To so hold will not create any conflict between the courts and the commission, because in all such suits the courts will be

bound and guided and controlled in all respects in entertaining and deciding or dismissing them as much by section 23 of the constitution and the Public Utility Act as by any other provision of the law.

These views are further strengthened by the language of section 74 of the Public Utility Act, wherein it is said: "This act shall not have the effect to release or waive any right of action by the state, the commission, or any person or corporation for any right, penalty or forfeiture which may have arisen or accrued or may hereafter arise or accrue under any law of this state." This section would seem to put a fitting ending to all discussion.

The demurrer to the petition for a writ is sustained and the writ denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 21, 1919.

All the Justices concurred.

[Civ. No. 2919. First Appellate District, Division Two.—September 22, 1919.]

W. W. KIMBALL COMPANY (a Corporation), Appellant,
v. ALICE READ, Respondent.

- [1] FOREIGN CORPORATIONS—ACTION ON ASSIGNED CONTRACT—REPEALED CODE SECTION INAPPLICABLE—UNSUPPORTED JUDGMENT.—In this action in replevin by a foreign corporation on an assigned conditional lease contract covering a piano, the purchaser having defaulted in her payments, sections 405, 406, 408, and 410 of the Civil Code were clearly inapplicable, they having been repealed before the action was instituted and before the assignment of the contract of sale to plaintiff was made; therefore, the findings of the trial court based upon the noncompliance with these repealed sections of the code do not support the judgment of dismissal.
- [2] ID.—ENGAGING IN INTERSTATE BUSINESS—RIGHT TO MAINTAIN OR DEFEND ACTIONS—STATUTE INAPPLICABLE.—The statute relating to the right of foreign corporations to maintain or defend actions in

this state is inapplicable to foreign corporations engaged wholly in interstate commerce and not doing any intrastate business.

- [3] **ID.—FILLING OF ORDERS SENT TO OTHER STATE—INTERSTATE COMMERCE.**—Sales, followed by the delivery of the articles in this state, upon orders sent from this state to the foreign corporation in another state, are transactions in interstate commerce and beyond the scope of the statute.
- [4] **ID.—ASSIGNMENT INCIDENTAL TO INTERSTATE COMMERCE.**—Where the ordinary business of the foreign corporation was to engage in such interstate transactions, the taking of a single assignment of a conditional sale contract in part liquidation of the indebtedness owing from a local firm to it was not an intrastate transaction, but was a transaction incidental to its interstate business.
- [5] **ID.—SALES IN INTERSTATE COMMERCE—RIGHT OF FOREIGN CORPORATION TO ENFORCE PAYMENT.**—When a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose.
- [6] **ID.—BAR OF STATUTE—BURDEN OF PROOF.**—The burden is on the party pleading the bar of the statute to show that the case comes within its terms.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nosstrand, Judge. Reversed.

The facts are stated in the opinion of the court.

Willard P. Smith for Appellant.

Franklin P. Bull and A. Walter Allen for Respondent.

NOURSE, J.—Plaintiff is a foreign corporation organized under the laws of the state of Illinois and having its principal place of business in Chicago. For some time prior to the institution of this proceeding it had been selling pianos

3. What constitutes doing business in state by foreign corporation, notes, 2 Ann. Cas. 307; 8 Ann. Cas. 942; 11 Ann. Cas. 320; Ann. Cas. 1912A, 553; Ann. Cas. 1913E, 1154.

4. Single or isolated transaction by foreign corporation as "doing business" within the state, note, 10 L. R. A. (N. S.) 693.

to a retail firm located in San Francisco. This local firm sold these and other pianos to its customers in this state upon conditional lease contracts providing for progressive payments. One such contract was made between this local firm and the respondent herein covering a piano not sold to the local firm by appellant, and this contract was assigned to appellant. Respondent defaulted in her payments on this contract and appellant commenced this action in replevin. Respondent interposed the special defense that appellant was without capacity to sue because it "has not complied with the laws of the state of California, in regard to foreign corporations doing business in this state." This issue was tried on the theory that the rights of plaintiff to maintain the action depended upon a compliance with the provisions of sections 405, 406, 408, and 410 of the Civil Code. The trial court found that plaintiff had not complied with these sections of the code, and accordingly dismissed the action.

All the briefs on this appeal are concerned with the interpretation and constitutionality of these sections of the code. [1] These sections are clearly inapplicable to this case because they were all repealed before this action was instituted and before the assignment of the contract of sale was made. (Stats. 1917, p. 381.) Accordingly, the findings of the trial court based upon the noncompliance with these repealed sections of the code do not support the judgment of dismissal.

The existing statute, which was enacted before the assignment of the contract, provides that a foreign corporation which has failed to file a copy of its articles, designation of agent, etc., cannot maintain or defend "any action or proceeding concerning its property in this state or any intra-state business or transaction, in any court of this state."

This was the law of the state which respondent unknowingly alleged appellant had not complied with. Though the statute was thus put in issue, it was not called to the attention of the trial court and has not been referred to on this appeal. Without the aid of argument by counsel, no attempt will be made in this opinion to interpret the existing statute or to determine its constitutionality. However, certain rulings were made during the trial on the question of the right of the state to close its courts to foreign corporations, and as these questions will necessarily arise again at the retrial

of the action, it may be of some assistance to the parties to make the following general observations on this proposition:

[2] If appellant was engaged wholly in interstate commerce and was not doing any intrastate business, the statute is inapplicable because, in view of the commerce clause of the federal constitution, the state cannot put any burden upon persons or corporations engaged wholly in interstate commerce. [3] Manifestly, the sales, followed by the delivery of the pianos in this state, upon orders sent from this state to the appellant in the state of Illinois, are transactions in interstate commerce and beyond the scope of the statute. (*Sioux Remedy Co. v. Cope*, 235 U. S. 197, [59 L. Ed. 193, 35 Sup. Ct. Rep. 57]; *International Text-book Co. v. Pigg*, 217 U. S. 91, [18 Ann. Cas. 1103, 27 L. R. A. (N. S.) 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481, see, also, Rose's U. S. Notes]; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, [57 L. Ed. 189, 33 Sup. Ct. Rep. 41]; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, [56 South. 961].)

[4] It appears without conflict from the evidence that such was the ordinary business of the appellant corporation. Therefore, the assignment of respondent's sale contract to appellant was outside the ordinary business of appellant and, as the trial court correctly ruled, did not constitute doing business in this state. (*General Conference Free Baptists v. Berkey*, 156 Cal. 466, 470, [105 Pac. 411]; *Ichenhauser Co. v. Landrum's Assignee*, 153 Ky. 316, [155 S. W. 738, 740]; *A. Booth & Co. v. Weigand*, 30 Utah, 135, [10 L. R. A. (N. S.) 693, 83 Pac. 734, 737].) In other words, the taking of the single assignment was not an intrastate transaction, but was a transaction incidental to the interstate business of the corporation.

[5] The right of a foreign corporation to sue to collect the purchase price of merchandise sold in interstate commerce is succinctly stated by the United States supreme court in *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 204, [59 L. Ed. 193, 35 Sup. Ct. Rep. 57, see, also, Rose's U. S. Notes]: "We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the

state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose."

Here the assignment of the sale contract was taken in part liquidation of the indebtedness owing from the local firm to appellant arising from interstate commercial transactions. As appellant could sue the assignor for the collection of the original debt, so it may sue the respondent in this action upon the assigned contract, unless it is shown to have been also engaged in intrastate business.

[6] The burden is on the party pleading the bar of the statute to show that the case comes within its terms. For the want of such showing the judgment must be reversed.

Brittain, J., and Langdon, P. J., concurred.

[Civ. No. 3028. First Appellate District, Division Two.—September 23, 1919.]

J. H. SMITH, Appellant, v. GOLDEN STATE SYNDICATE
(a Corporation) et al., Defendants; E. C. LAUX, Intervener and Respondent.

[1] **TAX SALES — CONSTRUCTION OF SECTION 3898, POLITICAL CODE — WHEN PROVISIONS APPLICABLE.**—The provision of section 3898 of the Political Code providing for the reimbursement of the purchaser at a tax sale whenever it shall be determined in an action at law that such sale and the conveyance are void merely affects the remedy of such purchaser and is intended to apply to all cases after its passage in which the invalidity of a tax title is judicially determined, notwithstanding the sale may have been held prior to the enactment of such law.

[2] **ID.—VOID TAX SALE—RIGHT OF PURCHASER TO REIMBURSEMENT—CODE PROVISION POSITIVE — FORM OF PLEADING IMMATERIAL.**—In view of the positive provision of section 3898 of the Political Code that no decree shall be made until the purchaser of the tax title shall have been refunded the amount paid for taxes, such relief must be granted to such purchaser in an action by the owner to quiet title to the property, notwithstanding such purchaser, in his complaint in intervention, does not pray for a refund of the amount paid for taxes but, relying on his tax title, alleges that he is the owner in fee simple of the property.

- [3] **APPEAL—EVIDENCE NOT BROUGHT UP—PRESUMPTION.**—Where an appeal is taken on the judgment-roll alone, the appellate court, not knowing what evidence was introduced, nor what objections were made thereto, must presume, in support of the judgment, that evidence supporting the findings of the trial court was properly admitted.
- [4] **TRIAL—EVIDENCE—ADMISSION WITHOUT OBJECTION—FINDING.**—If evidence, not otherwise admissible, is admitted without objection, a finding based thereon is proper.
- [5] **APPEAL—WAIVER OF OBJECTIONS TO EVIDENCE—PRESUMPTION.**—On appeal on the judgment-roll alone, it will be assumed in support of the judgment that all objections to evidence sustaining the findings were waived.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. Everett Brown for Appellant.

Ward Chapman and L. M. Chapman for Respondents.

LANGDON, P. J.—This is an action to quiet title to certain real property in the city of Los Angeles. E. C. Laux, the respondent, filed a complaint in intervention, claiming to be the owner of a portion of the land described in plaintiff's complaint. The action was tried and judgment given upon the complaint in intervention of E. C. Laux and the answer thereto of J. H. Smith. The complaint in intervention was in form a suit to quiet title and alleged that the intervener was the owner in fee of the real property therein described. The answer was a denial of the title of the intervener. The court found that the intervener had no right or title to the said property except that he had purchased a tax deed therefor from the city of Los Angeles, and further found that said tax deed was null and void. Judgment was entered against the intervener and in favor of the appellant, but it was provided therein that said judgment should not take effect until payment by the appellant to said intervener of \$561.35, the amount of taxes paid by the intervener upon the property. From the portion of the judgment requiring such payment an appeal is taken.

[1] Section 3898 of the Political Code (subdivision 5) provides: "Whenever, in any action at law, it shall be determined by a court that the sale and conveyance provided for in this and the preceding section are void for any reason and that the purchaser from the state may not be finally awarded the property so purchased, no decree of the court shall be given declaring a forfeiture of the property until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold." Appellant contends that this subdivision of section 3898 is inapplicable here, because it was added by amendment in 1913 (Stats. 1913, p. 560) and the tax deed under which the intervener claims is dated March 8, 1912. We are of the opinion that this statute merely affects the remedy of the purchaser of a tax title and that it was intended to apply to all cases after its passage in which the invalidity of a tax title was judicially determined. This seems also to have been the view taken of this section by the court in the case of *Real v. County of Kern*, 39 Cal. App. 723, [179 Pac. 726], where it is said that notwithstanding the fact that a purported conveyance was made prior to the enactment of this section, the rights of the purchaser of the tax title were to be measured by the statute as it existed when the court adjudged that he was not entitled to an award of the property.

[2] The other point made by the appellant is that the tax title was not pleaded and that the prayer of the complaint in intervention was not for a refund of the amount paid for taxes. We think there is no merit in this contention. Section 3898 of the Political Code provides positively that no decree shall be made until this relief is granted to the purchaser of a tax title. The intervener alleged that he was the owner in fee simple of the property. In support of that claim, presumably from the findings, he offered evidence of his tax deed. Appellant contends that the evidence supporting the finding that the amount paid by the intervener does not exceed the total amount of taxes due on said property at the date of the sale was improperly admitted because no issue was made upon this question by the pleadings. [3] The appeal comes to us upon the judgment-roll alone. We do not know what evidence was introduced nor what ob-

jections were made thereto. In support of the judgment we will presume that evidence supporting the findings was properly admitted. [4] If evidence, not otherwise admissible, is admitted without objection, a finding based thereon is proper. As was said in the case of *McDougald v. Hulet*, 132 Cal., at page 163, [64 Pac. 281]: "Conceding that the pleadings were not sufficient to justify the admission of evidence of the promissory note, it does not appear that any objection was made to such evidence. We must presume that the evidence was received without objection and that it sustains the findings. It cannot be contended that a finding is not within the issues, if no objection was made to the evidence in support of the finding at the trial." (Citing *Horton v. Dominguez*, 68 Cal. 642, [10 Pac. 186]; *Moore v. Campbell*, 72 Cal. 253, [13 Pac. 689].) [5] On appeal on the judgment-roll alone, it will be assumed in support of the judgment that all objections to evidence sustaining the findings were waived. (*Poledori v. Newman*, 116 Cal. 375, [48 Pac. 325].)

From the entire record before us, it appears that this judgment is in all respects an equitable one, and the same is affirmed.

Brittain, J., and Nourse, J., concurred.

[Civ. No. 3119. Second Appellate District, Division One.—September 23, 1919.]

ADOLPH H. SIDLER, Petitioner, v. THE CITY COUNCIL OF THE CITY OF BAKERSFIELD et al., Respondents.

[1] **MUNICIPAL CORPORATIONS—BAKERSFIELD—RECALL OF OFFICERS—DUTY OF COUNCIL TO CALL ELECTION—WHEN MANDATORY.**—The duty imposed upon the city council of the city of Bakersfield to order and fix a day for the holding of a recall election upon being presented with a duly certified recall petition is mandatory only where a petition sufficient in form and substance is presented. If any requisite and material statement is omitted therefrom so as to make it appear that the petition is invalid, the council is justified in refusing to order and fix a day for the holding of such election.

[2] ID.—GROUNDS FOR REMOVAL—STATEMENT OF NOT NECESSARY.—

Under the charter of the city of Bakersfield it is not necessary that the affidavit required to be filed by an elector as a condition precedent to the issuance of the recall petition papers or that the recall petition contain a statement of the grounds upon which the removal is sought.

PROCEEDING in Mandamus to compel the city council of the city of Bakersfield to order and fix a day for the holding of a recall election. Writ issued.

The facts are stated in the opinion of the court.

Irwin & McNamara for Petitioner.

Kaye & Siemon for Respondents.

JAMES, J.—Mandate to compel the respondent, city council of the city of Bakersfield, to order and fix a day for the holding of a recall election. A petition, duly certified by the clerk of the municipality to be sufficient and asking for the recall of a councilman, was submitted to the respondent council. Notice of the certification and submission of such petition was also given to the officer sought to be recalled by said clerk, as the city charter provided, and said official failed to take advantage of the option given him by the charter to resign. Nevertheless, the city council continued, and still continues, to refuse to order and fix a day for the holding of the recall election. The alternative writ was issued herein and, by way of return, demurrer and answer were filed. The answer raised no issue of fact and the entire cause was submitted after argument by counsel. The sole point relied upon by respondents as justifying the refusal of the council to order the recall election is that the petition contained no statement of the ground upon which the removal of the officer was sought and hence was insufficient. [1] Upon being presented with a duly certified recall petition the duty of the city council under the provisions of the charter to order an election to be held is a mandatory one. This duty, however, is mandatory only where a petition sufficient in form and substance is presented. If any requisite and material statement was omitted therefrom so as to make it appear that the petition was invalid, the council would be justified in the action taken. (*Conn v. City Council of the*

City of Richmond, 17 Cal. App. 705, [121 Pac. 714, 719].) The charter of the city of Bakersfield (Stats. 1915, p. 1552) contains provisions authorizing the recall of municipal officers. Sections 87, 88, and 90 read as follows:

"Sec. 87. Any officer elected or appointed for a definite term may be recalled, after the expiration of three months from the commencement of his term, by the electors entitled to vote for his successor. When a petition for the recall of a councilman is presented signed by electors of the ward which he represents, equal in number to twenty-five per cent, or more, of the total vote cast for councilman in such ward, at the last general election, and certified by the clerk, and his resignation shall not have been received, as herein provided, the recall of such councilman shall be submitted to a vote of the electors of said ward. When the officer sought to be recalled is not a councilman, the recall of such officer shall be signed by electors of the city equal in number to twenty-five per cent, or more, of the number of votes cast at the last general election. The signatures to such petition need not be all appended to one paper.

"Sec. 88. Petition papers shall be procured only from the clerk, who shall keep a sufficient number of such blank petitions for distribution, as herein provided.

"Sec. 90. Each signer of a recall petition shall sign his name in ink or indelible pencil and shall place thereon after his name his place of residence by street and number. To each such petition paper shall be attached an affidavit of the circulator thereof, stating the number of signers to such part of the petition and that each signature appended to the paper was made in his presence and is the signature of the person whose name it purports to be."

By section 161 of the charter it is provided that "whenever any municipal function or affair arises, for which no provision is made by this charter or ordinances, the law of the state applicable thereto shall govern." Section 86 of the same law provides that the provisions of the state law "relating to the qualifications of voters, the manner of voting, the duties of election officers, the canvassing of returns, and all other particulars in respect to the management of elections, so far as they may be applicable and not inconsistent or in conflict with this charter shall govern all elections."

[2] Viewing these provisions of the charter, respondents insist, first, that the charter does not contain complete direction as to what shall be the contents of recall petitions; second, that the charter being deficient in the respect last noted, the general state law governing the recall of municipal officers becomes applicable by reason of the references made in the provisions of section 161, above quoted. We may assume at the outset for the purposes of this case that the general laws of the state are applicable and control in the municipal affairs of the city of Bakersfield wherever it has been omitted by the charter to cover the same matters. But it appears that the framers of the charter did make specific provision, not only for the manner of the recall of the municipal officers, but gave sufficient direction as to what the substance of the recall petition should be. Referring to the general law on the same subject (see Deering's Gen. Laws, 1915 ed., Act No. 2555), we find that paragraph 87 of the charter in general parallels the provisions of section 1 of the general law, but omits therefrom the direction found in the general law that a recall petition "shall contain a statement of the grounds on which the removal or recall is sought, which statement is intended solely for the information of the electors." That this omission was intentional is borne out by the further requirement in section 89 of the charter relative to the filing of an affidavit by an elector—a condition precedent to the issuance of petition papers—which affidavit is required to state "the name and office of the officer sought to be removed." It is not required that this affidavit shall set forth any grounds upon which the removal is sought, and to us it appears to have been the clear intention of the framers of the charter that no such ground need be stated. For the reasons given, it is not made to appear that the petition, as certified to the council by the clerk, was insufficient in form or substance; hence the mandatory duty rested with respondents to "order and fix a day" for the holding of the recall election as the charter provides.

The demurrer of respondents to the petition is overruled. Peremptory writ of mandate is ordered to be issued as prayed for in the petition, petitioner to have his costs.

Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on October 22, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 21, 1919.

All the Justices concurred.

[Civ. No. 3037. First Appellate District, Division Two.—September 24, 1919.]

SECURITY COMMERCIAL & SAVINGS BANK OF SAN DIEGO (a Corporation), Respondent, v. WM. SEITZ et al., Appellants.

- [1] **VENDOR AND VENDEE—REPRESENTATIONS BY REAL ESTATE OPERATOR—MORTGAGEE NOT PARTY—NONLIABILITY.**—Where the original mortgagee was not interested in the land purchased by the mortgagor and had no knowledge of the representations made by the real estate operator who conducted the transaction, and the latter was not its agent in the transaction, neither such mortgagee nor its assignee are chargeable with the fraud of such real estate operator.
- [2] **PLEADING—ACTION TO FORECLOSE MORTGAGE—AFFIRMATIVE RELIEF BASED ON FRAUD—ELECTION OF REMEDIES.**—In an action to foreclose a mortgage given as security for the payment of a promissory note executed by the defendants as part payment for the property, such defendants, in seeking affirmative relief by way of cross-complaint on account of alleged fraud in connection with the transaction, are required to elect which one of two remedies they intend to seek—damages after rescission or damages after affirmation. They cannot seek both.
- [3] **ID.—DELAY IN DISCOVERING FRAUD—BURDEN OF PLEADING AND PROOF.**—Where such relief was not sought within three years of the making of the alleged fraudulent representations, it was necessary to allege and prove, not only that the fraud was not discovered within the three-year period, but that it could not have been discovered within that time by the exercise of reasonable diligence.
- [4] **ID.—PRESUMPTION AGAINST FRAUD—EXERCISE OF DUE DILIGENCE—PLEADING.**—The presumption is always against fraud, and one who seeks relief against the effects of fraud must allege it and prove it by clear proof and satisfactory evidence. He must clearly show

that he did not discover the existence or commission of the alleged frauds within a reasonable time before the action was begun, that he proceeded promptly upon such discovery, and that his failure to make the discovery sooner was not due to his own lack of diligence. All this must be shown, not merely by a bare statement of such conclusions, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking an earlier discovery.

- [5] **ID.—WANT OF PLEADING AND PROOF—DENIAL OF RELIEF.**—Where the persons seeking relief on the ground of fraud alleged not to have been discovered until more than three years after it was committed not only fail to allege why they did not sooner discover the fraud or that they exercised diligence in seeking a discovery, but wholly fail to make any offer of proof upon either of these matters, the trial court is fully justified in denying their relief upon this plea.
- [6] **GUARANTY—CONSIDERATION—DISMISSAL OF PENDING ACTION.**—Dismissal of an action to foreclose a mortgage given as security for the payment of a promissory note constitutes a sufficient consideration for a written agreement by the title owner of the property about to be foreclosed guaranteeing the payment of that and another promissory note executed by the defendants to plaintiff's assignor.
- [7] **ID.—CONSIDERATION IMPLIED FROM WRITING.**—Where such contract of guaranty was in writing, the writing itself imports a consideration.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hendee & Rodabaugh and Henry C. Ryan for Appellants.

Ray M. Harris for Respondent.

NOURSE, J.—This is an action to foreclose a mortgage given to secure the payment of a promissory note for ten thousand dollars executed by the defendants, A. F. Mack and Wm. Seitz, Jr., and to enforce the payment of a written guaranty for the payment of said note subsequently executed by the defendant, Wm. Seitz, Sr. The note was executed and delivered to the Blochman Banking Company, a co-

6. Forbearance as sufficient consideration for contract of guaranty, notes, *Ann. Cas.* 1916A, 970; 19 *L. R. A.* (N. S.) 842.

partnership consisting of L. A. Blochman and J. A. Heap. This bank was subsequently incorporated under the name of Blochman Commercial & Savings Bank, and thereafter the name was changed by a decree of court to Security Commercial & Savings Bank of San Diego, the plaintiff and respondent herein.

The circumstances surrounding the execution of the note and mortgage are as follows:

One del Fungo, a real estate operator, induced the defendants, Mack and Seitz, Jr., to purchase some ninety acres of land situated in San Diego County at the agreed price of twenty-two thousand five hundred dollars. Payment therefor was made by these defendants by the execution and delivery of three promissory notes, dated November 15, 1912; one for six thousand dollars, which was delivered directly to del Fungo; one for six thousand five hundred dollars, due in six months; and one for ten thousand dollars, due in two years. The two latter notes were executed in favor of and delivered to the Blochman Banking Company. The one for six thousand five hundred dollars was unsecured and has been paid, and the one for ten thousand dollars was secured by a mortgage on the land purchased, and is the subject of this litigation. At the time of this transaction del Fungo was indebted to the Blochman Banking Company in the sum of \$14,520. When the notes above mentioned were executed they were deposited in escrow with a trust company in San Diego, together with the evidences of indebtedness of del Fungo to the bank, an additional cash advance from the bank to del Fungo and the deed of del Fungo, the owner, conveying the property to Mack and Seitz, Jr., with instructions to the trust company to deliver the documents to the parties entitled thereto upon the deposit of the respective evidences of indebtedness. Through this transaction the indebtedness of del Fungo to the bank was canceled. In lieu thereof the bank took the two notes, amounting to sixteen thousand five hundred dollars, and Mack and Seitz, Jr., took a deed transferring the title of the property to them.

The note for six thousand five hundred dollars was not paid when due, and the Blochman Commercial & Savings Bank, as assignee, commenced an action to enforce its collection against Mack and Seitz, Jr., on the tenth day of March, 1914. On the twenty-seventh day of March, 1914, Wm. Seitz,

Sr., guaranteed in writing the payment of both notes. In consideration of this guaranty the action on the six thousand five hundred dollar note was dismissed and the bank agreed to extend for one year the time of payment of the ten thousand dollar note, provided certain other conditions were complied with. On the day before this guaranty was made the title to the land covered by the mortgage passed by regular transfer to the guarantor, Wm. Seitz, Sr. The trial court found that the guaranty was given in consideration of the dismissal of the action mentioned, and that Wm. Seitz, Sr., received adequate consideration therefor. Judgment went for plaintiff against all three defendants, from which they gave notice of their desire to severally and separately appeal.

No answer appears in the record, but by way of cross-complaint defendants set up fraud in the purchase of the land, asked damages against Blochman and Heap, who composed the copartnership known as the Blochman Banking Company, and demanded the cancellation of the note and mortgage as against the plaintiff, Security Commercial & Savings Bank of San Diego. The allegations of fraud are that del Fungo took defendants Mack and Seitz, Jr., out to see the land sold and pointed out to them other and better land than that described in the deed and mortgage. It was also alleged that del Fungo represented to said defendants that the land he was offering them for twenty-two thousand five hundred dollars was worth more than fifty thousand dollars, whereas in fact the land actually conveyed was worth much less than twenty-two thousand five hundred dollars, the purchase price paid by defendants. In order to state a case against the cross-defendants, Blochman and Heap, it was alleged that del Fungo was their agent and employee, that the false representations were made in their behalf, and that they knew they were false.

Treating the alleged cross-complaint as an equitable defense to plaintiff's cause of action because of the allegations of fraud in the execution and delivery of the note and mortgage (and we assume this was what was done by the trial court, although the record is silent upon this point), it is evident that this defense rests entirely upon the proposition that del Fungo was the agent of Blochman and Heap, that the false representations were made in their behalf, and that they knew them to be false. The trial court found against

defendants on all of these allegations, and this finding is amply supported by the evidence.

Appellants' position seems to be that, the note being non-negotiable, the respondent is charged with knowledge of all of the legal defenses available to the mortgagors. In support of this they cite numerous authorities holding that one who is about to take the assignment of a mortgage is bound to inquire of the mortgagor if he has any legal defenses to the mortgage, and that if he fails to do this, he takes the mortgage subject to all legal objections or infirmities which could have been set up against it in the hands of the original mortgagee, being charged with all facts which such an inquiry would have disclosed.

[1] The facts of this case, as found by the trial court, show clearly that the rule of these decisions is not applicable here. The original mortgagee was the Blochman Banking Company, a copartnership, and not del Fungo, the party who is alleged to have committed the fraud. Against the bank appellants could raise no different defenses than they have raised against the assignee of the bank. If, as is found by the court, the original mortgagee was not interested in the land purchased and had no knowledge of the representations of del Fungo, and he was not its agent in this transaction, it was not chargeable with the fraud of del Fungo.

All that has been said herein regarding the defense of fraud has been said on the assumption that the alleged fraud was properly pleaded. But the cross-complainants in the same pleading and in the same cause of action set up the alleged fraudulent representations and the damages resulting therefrom, seeking a rescission or cancellation of the note and mortgage as against one cross-defendant and damages for the fraud as against the others. They alleged that they did not discover the fraud until more than three years after it was committed, but did not explain why an earlier discovery was not made.

[2] In seeking affirmative relief cross-complainants were required to elect which one of two remedies they intended to seek—damages after rescission or damages after affirmance. They could not seek both. (*Hines v. Brode*, 168 Cal. 507, 512, [143 Pac. 729].) [3] Whether the pleading be treated as a cause of action for rescission or one for fraud after affirmance, it was necessary to allege and prove, not only that

the fraud was not discovered within the three-year period, but that it could not have been discovered within that time by the exercise of reasonable diligence. (*Montgomery v. Peterson*, 27 Cal. App. 671, 676, [151 Pac. 23]; *Truett v. Onderdonk*, 120 Cal. 581, 589, [53 Pac. 26].)

[4] The presumption is always against fraud. This presumption is as strong as that of innocence of crime. One who seeks relief against the effects of fraud must allege it and prove it by clear proof and satisfactory evidence. "They must clearly show that they did not discover the existence or commission of the alleged frauds until within a reasonable time before the action was begun, that they proceeded promptly upon such discovery, and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking a discovery."

(*Del Campo v. Camarillo*, 154 Cal. 647, 657, [98 Pac. 1049, 1054].) [5] Cross-complainants not only failed to allege why they did not sooner discover the fraud or that they exercised diligence in seeking a discovery, but they wholly failed to make any offer of proof upon either of these matters. The trial court was fully justified in denying them affirmative relief upon this plea. As a defense to the main action they are in no better position. The trial court having found that respondent's assignor was not connected with the alleged fraud, respondent was justified in relying upon the presumption against fraud and the long acquiescence of the parties who claim to be the victims of the fraud, unexplained by any acts which would overcome this presumption.

[6] In support of the appeal on behalf of the appellant, Seitz, Sr., it is urged that there was no consideration for his guaranty of payment except that based on fraud, but the facts are, as the trial court properly found, that this guaranty was given in consideration of the dismissal of a certain action then pending in San Diego County in which Mack and Seitz, Jr., were defendants and this property was under attachment, Seitz, Sr., having previously become the title owner of the property. These facts clearly support the finding of the court that Seitz, Sr., received full and adequate consid-

eration for the guaranty. [7] Furthermore, the complaint alleges that the guaranty was in writing and sets it forth in *haec verba*. The writing itself imports a consideration. The allegations of the complaint are not denied, and the want of consideration for the guaranty is not put in issue by the defendants.

For the reasons given the judgment is affirmed.

Brittain, J., and Langdon, P. J., concurred.

[Civ. No. 2045. Third Appellate District.—September 25, 1919.]

VALLEJO HIGH SCHOOL DISTRICT OF SOLANO COUNTY, Petitioner, v. DAN H. WHITE, as County Superintendent of Schools, etc., Respondent.

- [1] SCHOOL LAW—EMPLOYMENT AND DISCHARGE OF TEACHERS—CONFLICT BETWEEN STATE AND MUNICIPAL LAW.—The government of schools and the employment and discharge of teachers are not municipal affairs, and, by virtue of the provisions of article XI, section 8, of the constitution, whenever a conflict arises between the provisions of the state law and the provisions of a city charter, the state law controls.
- [2] ID.—NOTICE OF TERMINATION OF SERVICES—RIGHT OF APPEAL TO COUNTY SUPERINTENDENT OF SCHOOLS.—Where a high school district after the first but before the tenth day of June of a given year, in writing, notifies the principal of the high school that his services will not be required after June 30th, such principal is not re-employed for the fiscal year beginning July 1st, following, and thereafter he is not a teacher in the employ of the high school district, and the county superintendent of schools has no authority or power to entertain his appeal for reinstatement or to reinstate him in his office as principal of the high school in that district.

PROCEEDING in Certiorari to review the action of the county superintendent of schools in reinstating a high school principal. Order for reinstatement set aside.

The facts are stated in the opinion of the court.

Breed & Burpee for Petitioner.

Arthur Lindauer, District Attorney, for Respondent.

ELLISON, P. J., *pro tem.*—The petition sets forth that the petitioner is a high school corporation; that the respondent is county superintendent of schools of Solano County, California; that the petitioner school district is composed of the city of Vallejo and adjacent territory of an area of approximately the same as the city of Vallejo; that prior to the year 1918 petitioner employed one Carl H. Nielsen, as principal of said high school, and he acted as such until the thirtieth day of June, 1919, at which time his employment ceased; that after the first day of June, and before the tenth day of June, 1919, petitioner, in writing, duly notified said Carl H. Nielsen that his services as principal of said high school would not be required after June 30, 1919, and that this notice was served upon him before the tenth day of June, 1919; that thereafter said Nielsen appealed to respondent as county superintendent of schools and asked that the action of the board of trustees of petitioner be reversed and he be reinstated as principal of said high school; that respondent, without notice to petitioner herein, reversed its action and reinstated said Nielsen as principal of said high school. Petitioner, claiming that respondent had no authority of law to entertain the appeal or make an order reinstating said Nielsen, applies to this court for a writ of review and asks that said action of said superintendent of schools in reinstating said Nielsen be annulled and set aside.

Respondent, by return of the writ, has set forth all his actions and proceedings as superintendent in connection therewith.

The controversy between petitioner and respondent grows out of the fact that the charter of the city of Vallejo contains different provisions on the subject of employment of teachers from that contained in the Political Code, and one of the questions submitted for decision is: Are the parties' rights to be governed by the state law, as found in the Political Code, or by the provisions of the charter of the city of Vallejo? The record shows that the petitioner received no notice that his services would not be needed after the current fiscal year, prior to the first day of May, 1919.

Section 1617 of the Political Code, under the heading of the powers and duties of trustees and boards of education in said school districts, provides: “. . . except that teachers

may be elected on or after June 1st for the next ensuing school year, and each teacher so elected shall be deemed re-elected from year to year thereafter unless the governing body of the school district shall on or before the tenth day of June give notice in writing to such teacher that his services will not be required for the ensuing school year."

Section 127 of the charter of the city of Vallejo (Stats. 1911, p. 2027), reads as follows: "Every person employed as a regular teacher by the school department shall be considered re-elected for the ensuing fiscal year unless at least two months before the beginning of such fiscal year he or she is notified in writing, by authority of the board of education, that it is expected that his or her services will not be required for the ensuing fiscal year."

If the provisions of the Political Code are to control, then it is clear that Mr. Nielsen's term as principal of the high school ceased on the thirtieth day of June, 1919. If the provisions of the city charter control, by reason of his not having the notice served on him at least two months before June 30th (which concededly was not done), he was deemed employed for another year, beginning July 1, 1919.

Do the provisions of the Political Code control in this particular matter or is it controlled by the provisions of the charter of the city of Vallejo? Counsel for respondent has argued the case on the theory that Nielsen was discharged after he was employed and the superintendent had the power of reinstating him. The question is really a somewhat different one. It is: Was he employed for the year beginning July 1, 1919? Both the quoted section of the Political Code and the charter of the city of Vallejo are very specific in using the word "re-elect." If the written notice is not given, he is re-elected. There was no express employment of Nielsen for another year, beginning July 1, 1919. If employed at all, it was because of the failure to give him proper notice that his services would not be needed for another year. If the state law controls, then the notice which was given to him by the petitioner prevented him from being re-elected for another year. If the provisions of the city charter control, then as notice was not given as provided therein, he was re-elected for another year.

We are of the opinion the state law controls in the matter and not the city charter.

Turning to the constitutional provision (article XI, section 8) which confers power upon cities to form and have adopted city charters, it is provided: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." [1] The government of schools and the employment and discharge of teachers are not municipal affairs and, by virtue of the constitutional provision referred to, the state law controls whenever a conflict arises. This has been decided so often by the supreme and appellate courts of this state that any lengthy discussion seems unnecessary.

Thus, in *Kennedy v. Miller*, 97 Cal. 434, [32 Pac. 560], it is said: "The powers and duties of the board of education in a city cannot trench upon the system that the legislature has provided for the entire state, since the charter is limited in its operation by any general law that may be passed by the legislature, and, in addition thereto, such powers and duties are, by the terms of the section in which they are authorized to be given, limited by the provisions of the Political Code."

"It is not, and cannot, be claimed that the election and dismissal of teachers in the public schools are 'municipal affairs,' which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law. (See *Kennedy v. Miller*, 97 Cal. 429, [32 Pac. 558]; *Mitchell v. Board of Education*, 137 Cal. 372, [70 Pac. 180].)"

These decisions are conclusive upon the point that in the matter under investigation the rights of the parties must be controlled by the provisions of the Political Code and not by the charter of the city of Vallejo.

It was suggested in argument that the code provisions that a teacher should be deemed re-elected unless he were given a twenty days' notice was passed for the benefit of the teacher and that the charter provisions declaring that he should be given a two months' notice was in line with the code provision and more favorable to the teacher than the code, and, therefore, there was really no conflict between the two. But

if the city, by provision in its charter, can lengthen the time for giving notice to two months, it can lengthen it to six months. And if the city by its charter has the power to lengthen the time of the notice to be given to a teacher it has the power to shorten it to ten days, or five days, or one day.

[2] We hold that Nielsen was not re-employed for the fiscal year, beginning July 1, 1919; that at the time the appeal was taken he was not a teacher in the employ of the high school district, and that the respondent had no authority or power to entertain his appeal or to reinstate him in his office as principal of the high school of the city of Vallejo.

The writ of review is granted and the orders of the respondent purporting to reinstate him, Carl H. Nielsen, as principal of the Vallejo high school are set aside and petitioner will recover its costs.

Hart, J., and Burnett, J., concurred.

[Civ. No. 2046. Third Appellate District.—September 25, 1919.]

CHARLES S. BROWN, Petitioner, v. DAN H. WHITE, as
County Superintendent of Schools, etc., Respondent.

[1] SCHOOL LAW—EMPLOYMENT OF HIGH SCHOOL PRINCIPAL—MANDAMUS TO COMPEL PAYMENT OF SALARY.—In this proceeding in *mandamus* to compel a county superintendent of schools to approve a requisition for the salary of the petitioner as principal of a given high school and to order the same paid to petitioner, the employment of petitioner's predecessor as principal of said high school having terminated on June 30th of the year in question, the board had authority to employ someone to take his place, and, before July 1st of that year, the petitioner having been regularly employed as such principal and having entered upon and performed the duties thereof, was legally entitled to the relief asked.

PROCEEDING in *Mandamus* to compel the approval by a county superintendent of a requisition for salary and to order same paid. Writ granted.

1. *Mandamus* to compel payment of salary of public officer or employee, note, 5 A. L. R. 572.

The facts are stated in the opinion of the court.

Breed & Burpee for Petitioner.

Arthur Lindauer, District Attorney, for Respondent.

ELLISON, P. J., *pro tem.*—Petitioner represents that the Vallejo High School District is a public high school corporation, composed of the city of Vallejo and of an additional area of approximately the same size as the city of Vallejo; that respondent is the county superintendent of schools of Solano County; that on the third day of June, 1919, the Vallejo High School District of Solano County employed petitioner, as principal of said high school and said intermediate schools for the school year commencing July 1, 1919, at an annual salary of two thousand four hundred dollars, payable in twelve equal monthly installments of two hundred dollars on the first of each and every month of said term; that thereupon said petitioner accepted said employment, and on the first day of July, 1919, entered upon the performance of his duties as such principal; that under the terms of said employment said Vallejo High School District of Solano County agreed to pay to your petitioner the sum of two hundred dollars on the first day of August, 1919; that said petitioner has duly performed all of the duties as such principal during the month of July, 1919, and has duly performed all conditions precedent to the payment of said sum of money; that thereafter said Vallejo High School District issued and delivered to petitioner a requisition in writing upon the high school fund of said high school district, in the regular and usual form, on respondent, as county superintendent of schools of Solano County; that petitioner presented said requisition to respondent in regular business hours, and demanded that he approve said requisition and order the same paid; that said respondent refused, and still refuses, without any cause, to approve said requisition, or to order the same paid, and that the whole of said two hundred dollars remains unpaid; petitioner prays that an alternative writ of mandate issue directed to respondent, requiring him, immediately after the receipt of said writ, to approve said requisition and order said sum paid to petitioner, or to show cause, etc., and for general relief.

In response to said alternative writ of mandate the respondent has filed an answer, in which he states that the Vallejo High School District of Solano County was, on the third day of June, 1919, without any right or authority to employ petitioner, Charles S. Brown, as principal of said high school and said intermediate schools for the year commencing July 1, 1919, at the annual salary of two thousand four hundred dollars, or any other amount; that said school district was without any right or authority to pay said Brown any salary, as principal of said high school and intermediate school, because one Carl H. Nielsen, a regular teacher of the Vallejo high school of Solano County, was and is the duly employed and acting principal of said school, by virtue of a contract entered into by and between Carl H. Nielsen and the Vallejo high school on the first day of August, 1918, wherein Carl H. Nielsen was employed and accepted said employment as principal of said school, at a yearly salary of two thousand four hundred dollars; that said contract has never been terminated and is now in full force and effect, Carl H. Nielsen having been re-elected principal of the Vallejo High School District for the ensuing fiscal year of 1919, by virtue and under the provisions of section 127 of the charter of the city of Vallejo.

The same question is involved in this case as was under consideration in the case of *Vallejo High School District of Solano County v. White*, ante, p. 359, [185 Pac. 302]. In this case as in that, it is claimed by respondent that Nielsen was never discharged from his position as principal of said school; that he, being the principal of the school, the board had no authority to employ petitioner Charles S. Brown.

[1] In *Vallejo High School District of Solano County v. White*, supra, it was held that Nielsen's employment as principal of said high school ended June 30, 1919. This being so, the board had authority to employ someone to take his place. And it appearing that the High School District before July 1, 1919, regularly employed petitioner as principal of said school and that he entered upon and performed the duties thereof, it follows that he is legally entitled to the relief asked.

It is, therefore, ordered that the writ of mandate issue to respondent, commanding him, as county superintendent of

schools of the county of Solano, to issue and deliver to petitioner a requisition for his salary for the month, beginning July 1, 1919, and ending July 31, 1919, in the sum of two hundred (\$200) dollars, and that petitioner herein recover his costs.

Hart, J., and Burnett, J., concurred.

[Civ. No. 3032. First Appellate District, Division Two.—September 26, 1919.]

E. H. TERRY et al., Appellants, v. SOUTHWESTERN BUILDING COMPANY et al., Respondents.

- [1] **MECHANICS' LIENS—CONSTRUCTION OF BUILDING—EXECUTION OF BOND IN FAVOR OF OWNERS ONLY—PROPERTY NOT RELIEVED FROM LIABILITY.**—A building contractor's bond not conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work, and which is not by its terms made to inure to the benefit of any and all persons who might perform labor upon or furnish materials to be used in the work described in the contract, as provided by section 1183 of the Code of Civil Procedure, but which, on the other hand, contains the express condition that no right of action shall accrue upon or by reason thereof to or for the use or benefit of any other person than the obligee therein named and that the obligation of the surety is and shall be construed strictly as one of suretyship only, is not such a bond as relieves the owner from liability of his property for liens under the statute.
- [2] **ID.—INTERPLEADER BY OWNERS—NONPAYMENT OF CLAIMS—SUFFICIENCY OF FINDINGS—JUDGMENT.**—In an action in the nature of suit in interpleader by the owners of real property upon which a building had been erected and against the building contractor, its surety, and numerous lien claimants, a conclusion of law "that said lien claimants are entitled to enforce liens upon the real property described in plaintiff's complaint for the payment of the several amounts found due them respectively as hereinbefore set forth" amounts to a finding of fact that such sums are due, although included in the conclusions of law; and in such a case the judgment will not be reversed for want of a direct finding that such sums are owing and unpaid.
- [3] **FINDINGS—CONSTRUCTION OF TO UPHOLD JUDGMENT.**—The entire findings and conclusions of law are to be construed to uphold the

judgment when, from the facts found, other facts may be inferred which will support the judgment.

- [4] **ID.—WANT OF FINDINGS—REVERSAL OF JUDGMENT.**—A judgment will not be reversed for want of a finding unless it appears there was no evidence, or lack of evidence which required the court to make a finding in favor of the appellant.
- [5] **ID.—INTERPLEADER—SUBSTANTIAL FACTS ADMITTED BY PLEADINGS—FINDING UNNECESSARY.**—Where the plaintiffs in a complaint in interpleader allege that they do not know the actual amounts due the various claimants, or whether or not their claims of lien are valid, and such lien claimants respectively in their cross-complaints allege that the labor and material furnished went into the plaintiffs' building, and that there were due, owing, and unpaid, after deducting all just credits and offsets, the sums claimed by them, and the plaintiffs did not deny these allegations but stipulated that their complaint should stand as their answer to the cross-complaints respectively, the substantial facts were thus admitted by the pleadings, and no finding was necessary.
- [6] **SURETYSHIP—NONLIABILITY OF SURETY TO LIEN CLAIMANTS—CONSTRUCTION OF BOND.**—Where a building contractor's bond expressly provides that neither such instrument nor any rights thereunder shall be assignable unless by the written consent of the surety, executed as therein specified, and that no right of action shall accrue upon or by reason of such bond to or for the use or benefit of anyone other than the obligee therein named, and that the obligation of the surety is and shall be construed strictly as one of suretyship only, no right of action can accrue thereupon for the benefit of lien claimants, and the obligees therein cannot, either directly or by bringing a suit in interpleader against such surety, the contractor, and the lien claimants, work an assignment of the contract. Such surety cannot be held beyond the express terms of the contract.
- [7] **INTERPLEADER—WHEN MAINTAINABLE—STATUS OF PLAINTIFF.**—The plaintiff in an interpleader suit cannot have a judgment in his favor nor urge the claims of certain interpleaded defendants against others, but must at all times maintain the position of a disinterested stakeholder, which alone gives him the right to maintain such a suit.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

Wm. T. Blakely for Appellants.

Allen & Weyl for Respondent National Surety Company.

BRITAIN, J.—The appellants, owners of real property in Los Angeles, on which a building had been constructed, commenced this action in the nature of a suit in interpleader, joining as defendants the building contractor, its surety, and numerous lien claimants. The surety was dismissed from the action by the trial court, certain lien claimants were given judgment against the contractor, and the amounts of their several judgments were decreed to be liens on the plaintiffs' property, which was ordered to be sold to satisfy them. The plaintiffs' appeal is on two grounds; first, that the court erred in dismissing the action as to the surety, and, second, that the judgment is not supported by the findings in three particulars which will be defined later in this opinion.

The action is of such an unusual character that it is necessary to an understanding of the appellants' contentions to state the essential facts upon which the suit was brought, as well as briefly to indicate the salient features of the litigation.

The Southwestern Building Company contracted to erect on the plaintiffs' property a building to cost six thousand dollars. The last one thousand five hundred dollars payment was to be made thirty-five days after the completion. [1] On the day the contract was executed the contractor, Southwestern Building Company, as principal, and National Surety Company, as surety, executed a bond running to the plaintiffs, for three thousand dollars. It referred to the contract and contained numerous conditions relating to the work and limiting the liability of the surety. It was not "conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work," and it was not by its terms "made to inure to the benefit of any and all persons" who might perform labor upon or furnish materials to be used in the work described in the contract, as provided by section 1183 of the Code of Civil Procedure. On the other hand, it contained the express condition "that no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee herein named, and that the obligation of the company is and shall be construed strictly as one of suretyship only." This was not such a bond as relieved

the owner from liability of his property for liens under the statute.

Before the final payment the owners began this action. They alleged they had the fund of one thousand five hundred dollars retained under the contract, which was set forth with a copy of the bond. They alleged the defendants other than the Surety Company claimed interests in the fund and claimed liens, that the plaintiffs were ignorant concerning the defendants' respective rights, and that the defendants threatened a multiplicity of suits. They prayed the defendants be restrained from taking any proceedings on account of their demands and liens, that they be required to interplead, that the one thousand five hundred dollars be adjudged to be the sum to be paid by the plaintiffs, that upon payment of that sum they and their property be relieved of all further obligations, and that judgment be entered in favor of the plaintiffs "and in favor of said defendants who establish their claims of lien against said premises, against the defendant, National Surety Company, for any amount which they may be entitled to in excess of said fund of one thousand five hundred dollars," and for general relief.

The demurrer of the National Surety Company was overruled. The lien claimants, or at least some of them, answered and cross-complained upon their respective liens. There was no formal order of interpleader. The case was sent to a referee to take evidence, which is not before this court. The report of the referee, which was adopted as the findings of fact, while perfectly clear in its meaning, was not drawn with the technical nicety of language which might have been used. For instance, the report stated "that the following claimants furnished repairs or materials, or both, on the property of the plaintiffs, and that said repairs and materials were actually used in the construction of said building, and that the charge for said materials was a reasonable charge thereon, and said mechanics' liens were recorded within the time required by law," following which was a list referring to the respective claims by exhibit letters, giving the respective dates of filing the liens to which the reference was made, and tabulating the respective amounts for which claims were approved.

[2] The appellants contend that these findings do not support the judgment because they do not contain the direct

statement that the amounts of the claims listed were owing or unpaid. It appears from the record that no exceptions were filed to the findings of the referee, and the court adopted them as its own, adding thereto what were designated as conclusions of law, in which, among other things, it is stated "that said lien claimants are entitled to enforce liens upon the real property described in plaintiffs' complaint for the payment of the several amounts found due them respectively as hereinbefore set forth." This statement amounts to a finding of fact that the sums were due, although included with the conclusions of law, and in such a case the judgment should not be reversed. (*Lange v. Waters*, 156 Cal. 142, [19 Ann. Cas. 1207, 103 Pac. 889].) [3] The entire findings and conclusions of law are to be construed to uphold the judgment when, from the facts found, other facts may be inferred which will support the judgment. (*Breeze v. Brooks*, 97 Cal. 72, [22 L. R. A. 257, 31 Pac. 742]; *Pacific States Corp. v. Arnold*, 23 Cal. App. 672, [139 Pac. 239].) [4] A judgment will not be reversed for want of a finding unless it appears there was evidence, or lack of evidence which required the court to make a finding in favor of the appellant. (*Bliss v. Sneath*, 119 Cal. 529, [51 Pac. 848].) The evidence is not before this court. The appellants make no argument upon this point and do not suggest in their brief that the lien claims were not justly due and unpaid. [5] On the other hand, in their complaint the plaintiffs alleged that they did not know the actual amounts due the various claimants, nor whether or not their claims of lien were valid. The lien claimants respectively in their cross-complaints alleged that the labor and material furnished went into the plaintiffs' building, and that there were due, owing, and unpaid, after deducting all just credits and offsets, the sums claimed by them. The plaintiffs did not deny these allegations, but stipulated that their complaint should stand as their answer to the cross-complaints respectively. The substantial facts were thus admitted by the pleadings, and no finding was necessary. (*Higgins v. San Diego Sav. Bank*, 129 Cal. 184, [61 Pac. 943].)

The same rule applies to the appellants' contention in regard to the phrase used by the referee that certain claimants furnished "repairs or materials, or both," and the further phrase that "the charge for said materials was a reasonable

charge thereon." The allegations of the cross-complaints in these particulars were not only direct and positive, but technically correct, and they were not denied by the plaintiffs. No ground for reversal is shown so far as the decree establishes the liens.

The third contention of the appellants is based on the same grounds as their attack on the dismissal of the Surety Company. The appellants rely on *Fuller v. Alturas School District*, 28 Cal. App. 609, [153 Pac. 543]. That case was decided on the authority of the decision in *Callan v. Empire Surety Co.*, 20 Cal. App. 483, [129 Pac. 978, 981]. In each of those cases the surety guaranteed both directly and by reference to the building contract that the contractor should well and truly perform the building contract. [6] In the present case the condition was "that if the principal (i. e., the contractor) indemnifies the obligee (i. e., the owners) against loss or damage directly arising by reason of the failure of the principal to faithfully perform the above-mentioned contract, then this instrument shall be null and void; otherwise to remain in full force and effect, provided, however, that this instrument is executed by the company as surety upon the following express conditions which shall be precedent to the right of recovery hereunder. . . . 7. None of the conditions or provisions contained in this instrument shall be deemed waived by the company unless the written consent to such waiver be duly executed by its president or vice president, and its seal be thereto affixed, duly attested; . . . nor shall this instrument or any rights thereunder be assignable unless with like consent duly executed and attested as aforesaid. . . . 11. That no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee herein named, and that the obligation of the company is and shall be construed strictly as one of suretyship only." This language is too explicit to permit interpretation. (Civ. Code, sec. 1638; *Pierce v. Merrill*, 128 Cal. 472, [79 Am. St. Rep. 56, 61 Pac. 64].) Considered as a contract of surety, no right of action accrued upon it for the benefit of lien claimants, and the plaintiffs could not either directly or by the bringing of this suit work an assignment of the contract. The surety could not be held beyond the express terms of the contract. (Civ. Code, sec. 2836.) In *Fuller v. Alturas School District*, *supra*, and *Cal-*

lan v. Empire Surety Co., supra, the guaranty was of the faithful performance of the contract. In this case it was that the contractor should indemnify the owners against loss or damage arising directly from his breach. Even though, under the rule in the Fuller and Callan cases, this be construed as a direct indemnity, neither at the time this action was commenced nor when judgment was rendered could the plaintiffs have maintained any action on the bond, for it is a statutory rule that "upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof." (Civ. Code, sec. 2778, subd. 2; *Fernandez v. Tormey*, 121 Cal. 518, 519, [53 Pac. 1119].)

While the action was not strictly one of interpleader, it was in the nature of such a suit. The plaintiffs alleged they held a fund claimed by the defendants. The National Surety Company did not claim, and could not have claimed, any part of the one thousand five hundred dollar fund. The plaintiffs asked that a judgment be rendered against the Surety Company in favor of other defendants upon a contract unconnected with the fund, and which the plaintiffs could not assign. [7] The plaintiff in an interpleader suit cannot have a judgment in his favor nor urge the claims of certain impleaded defendants against others. He must at all times maintain the position of a disinterested stakeholder, which alone gives him the right to maintain such a suit. (Code Civ. Proc., sec. 386; *Orient Ins. Co. v. Reed*, 81 Cal. 146, [22 Pac. 484]; *Pfister v. Wade*, 56 Cal. 46; *Wells-Fargo Co. v. Miner* (C. C.), 25 Fed. 533.)

The fact that under their subsequent pleadings the plaintiffs, the lien claimants, and the court treated the action as a consolidated lien case did not change the status of the Surety Company. Sufficient facts were stated by the plaintiffs to permit them to maintain an interpleader suit against the lien claimants in regard to the one thousand five hundred dollar fund, but no facts were stated which in this action could have warranted a judgment against the Surety Company, which was properly dismissed from the suit.

The judgment is affirmed.

Langdon, P. J., and Nourse, J., concurred.

[Civ. No. 3090. First Appellate District, Division One.—September 29, 1919.]

ARTHUR HUNT, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] **WORKMEN'S COMPENSATION ACT—RETURN OF INJURED EMPLOYEE AT FULL PAY—EXTENSION OF TIME FOR FILING APPLICATION FOR RELIEF.**—In the absence of a showing as to the existence of an agreement or understanding as between himself and his employer to the effect that the full pay which he received after he returned to work following his injuries but prior to his discharge, or a portion thereof, was to be in the nature of compensation for his injuries, or that the work which he performed during that period was either unsatisfactory to his employer, or that the compensation which he received therefor was more than his services during that time were actually worth, it cannot be held that the mere fact that the employer permitted him to return to his old position at full pay and to continue therein for several months could give rise to a claim that a portion of the pay which he thus received was in the nature of compensation for his previous injuries, and that the time within which he might make application to the Industrial Accident Commission for relief was thereby extended.

[2] **ID.—MEDICAL ATTENTION AS COMPENSATION.**—The fact that the injured employee visited his employer's physician for the purpose of examination, no treatment or medicine being received, did not constitute the receiving or rendering of such service as could be construed to amount to compensation under the provisions of the Workmen's Compensation Act which would prolong the prescribed time for the filing of his claim.

[3] **ID.—UNAUTHORIZED STATEMENTS—DELAY IN PRESENTING CLAIM NOT EXCUSED.**—In the absence of some showing that the persons with whom he discussed the matter of his claim to compensation, and who assured him that his claim was being given proper attention, had authority from the employer to make such a statement, or that their positions were such in relation to the employer as to justify him in relying upon such assurances, proof of such statements was insufficient to support his claim that he was lulled into a sense of security by representations made on behalf of his employer to the effect that his claim was being given proper attention during the period that he had returned to his employment and before his discharge.

PROCEEDING in Certiorari to review the action of the Industrial Accident Commission in denying an application for compensation. Application denied.

The facts are stated in the opinion of the court.

Clarence A. Henning for Petitioner.

A. E. Graupner for Respondents.

RICHARDS, J.—The petitioner, who was an employee of the United Railroads, received an injury to his spine on or about June 8, 1918, while in the course of said employment, by being thrown from a street-car upon which he was at the time acting as conductor. Twenty-eight days after the date of his injury he returned to work at his former employment, and received full pay therein for the next several months, when he was discharged by his employer. During the period that he was away from his work by reason of his injuries he received independent medical treatment, and after he returned to work and on or about August 15, 1918, he went to the company's physician for an examination, and went again three or four times for the same purpose, but received no treatment or medicine on any of those occasions, the company's physician informing him that the nature of his injuries was such that only time would effect a cure. After his discharge, on or about March 15, 1919, he made a claim for compensation to the claims attorney of his former employer, and was then sent for examination as to his physical condition to its physician, but no medical or surgical treatment was then given. Thereafter, and on March 18, 1919, his application for relief was filed before the Industrial Accident Commission. A hearing was had thereon, after which, upon the applicant's own testimony showing the foregoing facts, the commission denied his application upon the ground that it had been made too late and was barred under the provisions of the Workmen's Compensation Act, [Stats. 1917, p. 831]. After a petition for rehearing before the commission had also been denied, the application for a writ of review was presented by said petitioner to this court.

[1] Upon the hearing of said application the petitioner urged as a reason for his contention that the Industrial Accident Commission was in error in holding that his claim was barred by limitation, that the evidence showed the payment or giving of compensation for his injuries on the part of his employer which, under section 11 of the Workmen's Com-

pensation Act, would have extended the time within which his application should be filed. This claim as to the receipt of compensation on the part of the applicant was twofold, his first contention being that when he returned to work for his employer he was still suffering from his injuries, and was not able on that account to fully perform the duties of his position, but that notwithstanding that fact he received full pay for the time that he continued to be in its employ. The applicant, however, failed to show the existence of any agreement or understanding as between himself and his employer to the effect that the full pay which he received through said period, or any portion thereof, was to be in the nature of compensation for his injuries; nor did he show, nor attempt to show, that the work which he performed during that period was either unsatisfactory to his employer or that the compensation which he received therefor was more than his services during that time were actually worth. In the absence of such showing it cannot be held that the mere fact that the employer permitted the employee to return to his old position at full pay and to continue therein for several months could give rise to a claim that a portion of the pay which he thus received was in the nature of compensation for his previous injuries.

[2] The second contention of the applicant under this head is that he received compensation in the way of medical treatment from his employer which would suffice to prolong the time within which his application might be filed under section 11 of the Workmen's Compensation Act; but the evidence which he gave upon that subject is, in our opinion, insufficient to support such a claim. While it is true that some seven months before the date of the filing of his application with the commission he went to his employer's physician, and that he went again several times thereafter at dates not given by him, he testifies that he received no treatment and no medicine at any of these visits; while as to the visit of March 15, 1919, it is clear that he was sent to the physician on that occasion for an examination as to the nature and extent of his injuries in order that the claims agent of his employer might be able to determine the merits of his claim, and that upon that occasion no treatment was given or medicine supplied. There was, therefore, no service rendered which could be construed to amount to compensation under the provisions

of the Workmen's Compensation Act which would prolong the prescribed time for the filing of his claim.

[3] The final contention of the petitioner is that he was lulled into a sense of security by representations made on behalf of his employer to the effect that his claim was being given proper attention during the period that he had returned to his employment and before his discharge; but his evidence is insufficient to support this claim, since it appears that the only persons in the employ of the company with whom he discussed the matter of his right or claim to compensation were two car-dispatchers at its barn, who appear to have told him that his claim had been sent in and that he should receive compensation. There is no showing that these persons had any authority from the employer to make such a statement, or that their positions were such in relation to it as to justify the applicant herein in relying upon any assurances of that kind.

Upon the record before us it is clear that the claim of the petitioner was filed too late before the Industrial Accident Commission, and that the ruling of said commission that said claim was barred under the provisions of section 11 of the Workmens' Compensation Act was therefore correct, and it cannot be disturbed upon this application.

It follows that the application must be denied, and it is so ordered.

Beasley, P. J., *pro tem.*, and Kerrigan, J., concurred.

[Civ. No. 1675. Third Appellate District.—September 30, 1919.]

JOSEPH ROSENBERG et al., Executors, etc., Appellants,
v. CHARLES A. BUMP, Respondent.

[1] SCHOOL LANDS—GRANT TO STATE BY CONGRESS—LOCATIONS AND PATENTS—ACT OF 1852 NOT REPEALED.—The act of 1857 (Stats. 1857, p. 356), authorizing the location and patenting of school lands, did not repeal the act of 1852 (Stats. 1852, p. 41), which provided for the disposal of the five hundred thousand acres of land granted by Congress to the state of California, either expressly or necessarily from the general language thereof. To the contrary, the act of 1857 made certain portions of the act of 1852

a part of its own provisions, or, if it strictly cannot be said that this is true, it certainly and unquestionably recognized by express language the validity of the warrants issued under the prior act, the sale of such warrants and the rights acquired by purchasers of the same.

- [2] **ID.—PURPOSE OF ACT OF 1857.**—The legislature by the act of 1857 merely intended to regulate the matter of locating warrants issued by the state and acquired by purchasers under the act of 1852, so that such locations would conform to the requirements of the United States statutes relative thereto.
- [3] **ID.—RESERVATION CLAUSE IN ACT OF 1858—RIGHTS OF PURCHASERS UNDER EARLIER ACT.**—While the act of 1858 (Stats. 1858, p. 248) did expressly repeal, among others, the statute of 1852, it contained the express provision that "all school-land warrants, now in circulation, shall be received for school lands, and may be located as now provided by law." The meaning of this language is that school-land warrants in circulation at the time of the passage of the act of 1858 may be located as provided by the law existing at the time of the passage of said act, or as provided by the law authorizing the issuing and sale of such warrants.
- [4] **ID.—CONSTRUCTION OF ACT OF 1868—RIGHT TO LOCATE WARRANTS.**—The legislature did not intend by the act of 1868 (Stats. 1867-68, p. 507), providing a new and different procedure for obtaining patents to the unlocated portions of the five hundred thousand acres of land set apart as school land, to vest solely and exclusively in the surveyor-general the right to make school-land warrant selections. The sale of the warrant constituted a sale by the state of the number of acres of land specified in the warrant, a sale of the land so specified for all time and unconditionally, and there was nothing remaining for the purchaser to do but to locate the number of acres his warrant called for. Having bought and paid for the land, there was no reason why his warrant should be presented to the surveyor-general as in payment for something he had already paid for.
- [5] **ID.—RIGHT OF SURVEYOR-GENERAL TO LOCATE LANDS.**—The act of 1868 expressly limits the right of the surveyor-general to locate lands comprised within the grant by Congress to the unsold portions thereof, and it was not the intent of the legislature by such act to deprive owners of pre-existing land warrants of the right themselves to locate said warrants as agents of the state.
- [6] **ID.—OWNERSHIP OF OUTSTANDING WARRANTS—ADDITIONAL PERMISSIVE RIGHT UNDER ACT OF 1868.**—The provision of the act of 1868 that outstanding warrants shall be taken in payment of any part of the grant was intended only to be permissive—that is to say, that it was intended to confer upon owners of outstanding warrants the right, in addition to their pre-existing right to locate

the warrants as agents of the state, to present the same as payment on applications to purchase lands embraced within the congressional grant.

- [7] **ID.—EFFECT OF SAVING CLAUSE OF ACT OF 1868.**—By the saving clause of the act of 1868, the legislature intended to preserve to the purchasers of warrants issued and sold under the act of 1852 all the rights acquired by them by virtue of such warrants.
- [8] **ID.—VESTED RIGHT OF PURCHASER.**—The purchasers of school-land warrants issued and sold under the statutes of 1852 and 1853 acquired under such purchase a vested right to the amount of land specified in the warrants.
- [9] **ID.—SALE OF WARRANTS—CONTRACT WITH STATE—NATURE OF.**—The sale of school-land warrants by the state constituted a contract between the state and the purchasers of the warrants, although at the time of the sale the lands granted by Congress had not been listed to the state. The terms of the warrant were that the purchaser was entitled to locate the same in behalf of the state of California. The warrant constituted a contract of sale of the amount of land specified therein and which land was embraced within the grant to the state by Congress of five hundred thousand acres of land.
- [10] **ID.—RIGHT TO LOCATE WARRANTS—POWER OF LEGISLATURE TO AMEND PROCEDURE.**—While the legislature may amend the procedure or change the remedy whereby rights are judicially asserted, and such amendment or change may have a retroactive effect, except in those cases where the procedure or the remedy as amended or changed directly affects and impairs the right, the legislature is without the power to take away the right of the purchasers of school-land warrants to locate such warrants.
- [11] **ID.—DELAY IN LOCATING WARRANTS.**—As there was no time limit fixed by the statute of 1852 within which the locations were to be made, no rights could accrue to the state by reason of the delay in locating the warrants, it having been fully paid for the amount of land specified therein.

APPEAL from a judgment of the Superior Court of Monterey County. B. V. Sargent, Judge. Reversed.

The facts are stated in the opinion of the court.

M. W. McIntosh and Isaac Frohman for Appellants.

Leon Samuels for Respondent.

HART, J.—The action was brought in the superior court of Monterey County, under sections 3414 and 3415 of the

Political Code, to determine the title of certain lands in said county. Defendant had judgment, from which plaintiffs appeal on the judgment-roll.

Plaintiffs claim title to the south half of a certain section 13 and the fractional north half of a certain section 19, while the claim of defendant is to said south half of section 13 and the fractional northwest quarter and the west half of the northeast quarter of said section 19.

The claim of plaintiffs is based upon the following facts: By a certain act of Congress, five hundred thousand acres of land were granted to the state of California and, pursuant to an act of the legislature, approved May 3, 1852 (Stats. 1852, p. 41), land warrants were signed and issued by the Governor of the state, countersigned by the controller, deposited in the office of the state treasurer and thereafter sold. Between the second day of July, 1852, and the first day of October, 1853, four of said land warrants were issued and sold to different purchasers, each for the amount of 160 acres, and paid for at the rate of two dollars per acre. On the twentieth day of October, 1893, one Henry Jackson, who had by mesne assignments become the owner of said four land warrants, located the same on the lands claimed by plaintiffs and, on the 24th of August, 1900, said locations were approved and allowed by the commissioner of the general land office. Said Jackson, on the eighth day of February, 1901, by deed, conveyed said lands to one M. Brandenstein, who died testate on the 25th of March, 1906. His will was duly admitted to probate and plaintiffs were appointed as executors thereof and qualified as such.

On the seventh day of November, 1911, defendant filed with the surveyor-general of the state his application to purchase all of the lands claimed by plaintiffs, except the east half of the northeast quarter of said section 19.

There is no denial by the answer of or any dispute in any form as to these facts, which are alleged in the complaint, quoting from the reply brief as follows: "That on October 20, 1893, the day on which the locations were made, the lands involved were vacant and unappropriated lands of the United States and subject to sale and location at the United States land office at San Francisco; that they had been surveyed by the United States; that the plats of the survey had been approved and certified by the United States Surveyor-general

for the state of California and filed more than thirty days prior to October 20, 1893, in said land office; that Jackson, who was then the owner of the land warrants, located them on said lands conformably to the said survey; that he made the locations by filing with the register of said land office his written applications for said lands, specifically describing the same in the applications; that the applications were each accompanied by the affidavits of Jackson and at least one witness that there was no valid adverse claim existing upon any of said lands; that he surrendered the warrants to the register of the United States land office, who forwarded them to the general land office of the United States; that the locations were made with the consent of the register and receiver of the United States land office at San Francisco, and entered by them on the records of said office; that on August 24, 1900, the locations were approved and allowed by the commissioner of the general land office; that on January 23, 1901, the lands were certified and listed to the state by the United States as a part of the five hundred thousand acre grant to the state; that said certificates and listing of said lands was made under and in pursuance of said locations and not otherwise."

The answer, so far as its denials go, does no more than to challenge the allegations of the complaint that Jackson had conveyed the lands to Brandenstein, and that the latter, or the executors of his will, had any legal or equitable title to the lands or were the owners of any portion thereof. Affirmatively, the answer then declares that the act of 1852, under the terms of which the warrants in question were issued and sold to Jackson or his grantors, was repealed by the act of 1868, and that, therefore (so the answer concludes), at the time the locations were made by Jackson under said warrants "there was no law of said state whatever providing for the making of said locations," and that the locations were consequently null and void and conveyed no title or right or estate whatever to said Henry Jackson.

The court found that Brandenstein and his executors, ever since the date of the deed from Henry Jackson to the former, had been in the possession of said lands; that it is not true that M. Brandenstein and his executors have ever at any time been the owners of said lands or any part thereof; that, on the 28th of March, 1868 (Stats. 1867-68, p. 507), the legis-

lature of the state of California repealed the act of May 3, 1852, and "that at the time the said locations made by said Jackson were made, there was no law of said state whatever providing for the making of said locations, and said locations were, at the time the same were made, ever since have been, and now are, null and void, and conveyed no right or title or estate whatever to said Henry Jackson, and that said Henry Jackson did not at the time said locations were made, acquire, hold, or have, nor did he ever acquire, hold, have, or own any right, title, interest, or estate whatsoever either legal or equitable in or to said listed lands or any part of said listed lands." It is then found that, on the 7th of February, 1911, when defendant filed his application to purchase said lands, "all of said lands were vacant public lands belonging to the state of California, and subject to sale under the laws of the state," and the findings detail the steps taken by defendant in making his filing.

The judgment, which followed the findings, decreed that the surveyor-general approve each of the applications of defendant and, upon further compliance by defendant with the laws relating to the sale of lands, that there be issued to defendant such further evidence of title as is provided by law.

The whole controversy presented by this appeal hinges, it will be observed, on the solution of the question whether the appellants or the grantors of their testator lost their rights by virtue of the asserted repeal of the statute of 1852 by the later legislation respecting the disposal of the lands embraced within the five hundred thousand acre grant by Congress. The real point of divergence between the parties is upon the question whether the locations of the Jackson warrants were legally made.

The statute of 1852 was entitled, "An Act to provide for the disposal of the 500,000 acres of land granted to the State by Act of Congress" (Stats. 1852, p. 41), and the first section thereof contained the following provision:

"Sec. 1. The Governor of this State is hereby authorized to issue land warrants for not less than 160 and not more than 320 acres in one warrant, to the amount of 500,000 acres, which warrants when so signed and issued by the Governor, shall be countersigned by the Controller, and by him be de-

posited in the office of the Treasurer of State for sale, charging the same to account of the Treasurer."

Section 2 provided for the sale of warrants by the treasurer at the rate of two dollars per acre. Sections 3 and 14 of said act read as follows:

"Sec. 3. The parties purchasing such warrants and their assigns are hereby authorized in behalf of this State to locate the same upon any vacant and unappropriated lands belonging to the United States within the State of California subject to such location, but no such location shall be made unless it be made in conformity to the Law of Congress, which law provides that not less than 320 acres of land shall be granted in a body."

"Sec. 14. So soon as the lands which may be located under and by virtue of the provisions of this act shall have been surveyed by the United States, and such locations are made to conform thereto, the Governor of this State shall cause patents to be issued in such manner and form as the Legislature may hereafter direct."

A review and an analysis of the subsequent legislation with respect to the disposal of the five hundred thousand acre grant are correctly presented in the opening brief of the appellants as follows:

"On April 30, 1857, the legislature passed an act in reference to the location of warrants issued under the act of 1852, and the issuance of patents for the lands located thereunder entitled, 'An Act authorizing the location and patenting of school lands' (Stats. 1857, p. 356), section 1 of which provides:

"'Sec. 1. In all cases in which the lands of the United States have been duly surveyed by the general government, and the plat thereof shall have been on file thirty days in the land office of the proper district, it shall be lawful for the owner or owners of school land warrants, issued under the provisions of the act of this State, passed May 3d, 1852, in relation to the disposal of the 500,000 acres granted by the act of Congress of 4th September, 1841, to locate the same according to the legal subdivisions of the public lands, by filing a written application by such owner or owners, specifically describing the tract so located, with the Register of the United States Land Office for the proper district, accompanied by an affidavit of the party or parties

applicant, and of one or more witnesses, that there is no valid claim existing upon the land so desired, adverse to the claim of the person making such application for location.'

"On the 10th of April, 1858, the legislature passed an act creating a 'State Land Board for the State of California,' and designating its chief officer as 'the Register of the State Land Office,' and constituting the surveyor-general *ex-officio* register until otherwise provided. (Stats. 1858, p. 127.) This act prescribes with much particularity the duties of the register, and among them is that of keeping the record of all lands selected by the agents of the state of California as a portion of the five hundred thousand acre grant, showing the number of acres, the description of the land, the name of the original purchaser, the selecting or locating agent, the price per acre, and the numbers of school warrants under which the same are located.

"On the 23d of April, 1858, the legislature passed an act providing for the location and sale of the unsold portion of the five hundred thousand acres, and the seventy-two sections additional granted by the United States for the use of a seminary of learning. (Stats. 1858, p. 248.) By this act the Governor is authorized to appoint and commission in each of the United States land districts of the state, a locating agent, whose duty it is to locate unsold school lands and the seminary lands referred to, in the manner provided by law. The agents are required to proceed and obtain the consent of such settlers who may chance to avail themselves of the benefits of the act, and the request of others who are not settlers, and who may wish to purchase lands under its provisions, such consent or request to be accompanied by the affidavit of the parties and of two disinterested persons that there is no valid claim existing on the land adverse to theirs, and when such consent or request is obtained, under such forms as the Governor may prescribe, to apply to the register and receiver of their respective land offices to permit the location to be made in the name of the state, as a part of the grant above designated, and if permitted, to make the location in conformity with the laws and regulations of the United States.

"The twelfth section repeals the act of May 3, 1852, but declares that school land warrants then in circulation shall

be received for school lands and be located as then provided by law.

"On the 16th of April, 1859, the legislature passed an act for the issuance of patents for lands located under school land warrants, and for lands purchased under the act of April 23, 1858. (Stats. 1859, p. 338.) This act provides that in all cases where school land warrants have been issued under the act of May 3, 1852, and the same have been, or may be, located upon any of the public lands within this state subject to such location, and in accordance with the provisions of that act, or with the provisions of the act of April 30, 1857, or where parties have purchased under the act of April 23, 1858, and obtained a certificate of purchase from the registrar of the state land office, the holder of such warrant, or certificate of purchase, shall be entitled to receive a patent from the state for the lands thus located or purchased. The procedure for obtaining a patent is outlined in the act, and section 7 thereof repeals all acts, and parts of acts, conflicting with the provisions.

"Thereafter the legislature passed an act providing for the issuance of duplicate school land warrants in lieu of those lost, and on April 2, 1866, an act was adopted providing for the issuance by the register of the state land office of his certificate of the proper location of such warrant. (Stats. 1866, p. 854.)

"These acts were followed by the act of March 28, 1868, repealing all of the foregoing acts, providing a new and different procedure for obtaining patents to the unlocated portions of the five hundred thousand acres set apart as school land; providing further (sec. 54) that warrants issued in pursuance of the act to provide for the disposal of the five hundred thousand acres of land granted to the state by act of Congress shall be taken in payment of any part of said grant, provided that said warrant shall be paid directly to the register of the state land office, and shall be by him canceled before a certificate of purchase shall issue for the said lands; and also providing in section 71 of said act that all the various acts heretofore referred to shall be repealed, but that the provisions of said act 'shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of any claimant under the State, nor affect any suit or proceeding which is

now pending respecting the same, arising out of any claims now made; but the courts of the state may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto, under any existing laws of this state, the provisions of this act to the contrary notwithstanding.' (Stats. 1867-68, p. 507.)

"The act of March 28, 1868, in so far as the same relates to school lands, has since been amended in some particulars, but its main features were subsequently embodied in the Political Code of California, in sections 3494 to 3503, inclusive."

The contention of the appellants is that their rights were in no way impaired by the legislation prescribing the manner of the disposal by the state of the five hundred thousand acres of land granted to it by Congress following the enactment of the statute of 1852, but that their rights were preserved by said subsequent legislation and particularly by the saving clause contained in the statute of 1868, above quoted herein.

The specific argument of counsel for the respondent is that the locations made in 1893 could not have been valid locations, if attempted to be made under the act of 1852, for the reason that that act was repealed by the act of 1857, which provided "an entirely new procedure for the location of such land warrants"; that since, however, the appellants claim that, in making the locations, they followed the plan outlined by the statute of 1857 and not that prescribed by the statute of 1852, the inevitable result is that thus they "abandoned their claim to any protection under the act of 1852, so far as the same affected the procedure for locating lands under warrants issued under said act of 1852, and recognizing the right of the legislature to repeal said procedure or to enact any other provision in relation to such land warrants"; that the act of March 28, 1868, which expressly repealed all prior acts relating to this subject, "provided a new and different procedure for obtaining patents to the unlocated portion of the five hundred thousand acres granted to the state," and, therefore, to make the locations by Jackson valid, he should have followed the procedure laid down by said act of 1868.

[1] Replying to the above argument, we say, first, that the act of 1857 did not repeal the act of 1852 either expressly or necessarily from the general language thereof. To the

contrary, it seems plain to us that the act of 1857 made certain portions of the act of 1852 a part of its own provisions, or, if it strictly cannot be said that this is true, it certainly and unquestionably recognized by express language the validity of the warrants issued under the prior act, the sale of such warrants and the rights acquired by purchasers of the same. It will be noted that the initial section of the act of 1857 provides that, when the lands granted to the state shall have been surveyed by the general government, and the plat thereof shall have been on file for thirty days in the land office of the district, it shall be lawful for the owner or owners of school land warrants, issued under the provisions of the act of this state passed May 3, 1852, to locate the same according to the legal subdivisions of the public lands, "by filing a written application by such owner or owners," etc., with the register of the United States land office "for the proper district," etc. [2] It is as obvious as any proposition can be that, far from intending to repeal the act of 1852 by the act of 1857, the legislature by the latter act merely intended to regulate the matter of locating warrants issued by the state and acquired by purchasers under the act of 1852, so that such locations would conform to the requirements of the United States statutes relative thereto. In other words, at the time of the passage of the act of 1852, none of the government lands in this state subject to location under the congressional grant of five hundred thousand acres had been surveyed, but the legislature assumed, nevertheless, that it could then dispose of the granted land according to the plan established by the act of 1852. (*Toland v. Mandell*, 38 Cal. 30; *McNee v. Donahue*, 142 U. S. 587, [35 L. Ed. 1122, 12 Sup. Ct. Rep. 211, see, also, *Rose's U. S. Notes*].) The earlier California cases (see, for instance, *Doll v. Meador*, 16 Cal. 315), held that the method of selecting and locating the unsurveyed granted lands as prescribed by the statute of 1852 was not inconsistent or in conflict with the act of Congress, but later on a different view was taken of that proposition, the supreme court finally declaring and deciding that the granted lands could not be selected or located until they were surveyed by the United States, and that if other rights to the lands should be acquired by pre-emption, homestead, etc., before such survey, the pre-emptioner or homesteader would be entitled to the land. It was further held that in a

case where two land warrant selections or locations were made on the same land, one prior to and the other subsequent to the survey, the later location would prevail. (See *Terry v. Megerle*, 24 Cal. 609, 624, [85 Am. Dec. 84]; *Grogan v. Knight*, 27 Cal. 515; *Hastings v. Devlin*, 40 Cal. 358; *People v. Jackson*, 62 Cal. 548.) It was because of the situation so arising that the legislature of 1857 passed the act of that year, the evident purpose thereof being, as stated, among other things, to preserve the legal integrity of the warrants issued and sold under the act of 1852, said act of 1857 providing, as seen, a method for locating said warrants on surveyed lands, as required by the act of Congress. But, as further showing not only an intention but a determination on the part of the state to protect the rights of purchasers of warrants issued under the act of 1852, and whose validity is expressly recognized by the act of 1857 and intervening subsequent acts, we may refer to the fact that, in 1866, to correct the difficulties the state found itself up against prior thereto, created by its legislation relative to the disposal of the granted lands, resulting in legally improper selections, the legislature memorialized Congress to pass what in effect might be termed a corrective act, the effect of which was to confirm to the state all selections of the granted lands made by the state, in good faith, and sold by the state in good faith, and the Congress thereupon passed an act, on July 23, 1866, confirming, not all the lands which had been selected by the state, but only such lands as had been *selected and sold* to purchasers, in good faith, under the laws of the state. This act of Congress "had the effect," said the supreme court, in *Toland v. Mandell*, 38 Cal. 30, 43, "to legalize the possession of locators upon unsurveyed lands under the state, until they should have opportunity to present their claims for determination by the officers of the United States, as therein provided. Thereafter, their claims ceased to be within the rule of *Grogan v. Knight*, 27 Cal. 515. for they were, by the act, admitted to all the rights and privileges of pre-emptors upon unsurveyed lands, under the laws of the United States, which are comprised in the right of present possession, coupled with the right to purchase the title whenever the time at which a purchase can be effected shall have arrived."

The above decision was followed by the case of *Roberts v. Columbet*, 63 Cal. 22, where the appellant purchased from the state a school land warrant issued under the statute of 1852, and located the same in 1853, prior to the time that the land had been by the United States surveyed and listed to the state. The claim was that the location was invalid, but the supreme court held that the purchase by the appellant was in good faith and came within the confirmatory act of Congress, above referred to. The court, *inter alia*, said: "Since the passage of the act [of Congress] of July 23, 1866, we think that the position of the appellant has been essentially the same as it would have been if the land upon which he located his warrant had been, before the date of such location, surveyed by the United States."

From the foregoing considerations, it is entirely clear that the legislature did not intend by the act of 1857 to repeal the act of 1852, in so far as were concerned the rights acquired by purchasers of warrants issued by authority of the last-named act, assuming for the sake of the present discussion that the legislature possessed the power to abrogate the rights so acquired by a repeal of the statute, or at all. Indeed, it is clearly manifest, from an examination of all the legislation covering the subject of the disposal of the granted lands in question, from the statute of 1852 down to and including the act of 1868, the legislature on all occasions intended to and did take special pains to preserve and protect every vital right acquired by and invested in purchasers of school-land warrants under the statute of 1852. [3] The act of April 23, 1858 (Stats. 1858, p. 248), did expressly repeal, among others, the statute of 1852, but it contained the provision that "all school-land warrants, *now* in circulation, shall be received for school lands, and may be located *as now* provided by law." (Italics ours.) The meaning of this language, it is clear, is that school-land warrants in circulation at the time of the passage of the act of 1858 may be located as provided by law existing at the time of the passage of said act; or as provided by the law authorizing the issuing and sale of such warrants. And so, in every act passed by the legislature between the time of the passage of the act of 1858 and the time of the passage of the act of 1868, we find that the rights of the purchasers of these warrants were expressly recognized and preserved. It will, therefore, not be necessary to examine

herein in detail the several acts passed after the act of 1858, except the act of 1868. The important provisions of the several acts referred to are given above and plainly speak for themselves, and sustain the construction which, in a general way, we here ascribe to them.

The act of 1868 involved a general revision of the prior laws relating to school lands granted and belonging to the state and also an elaborate scheme for the disposal by the state of such lands. We shall not, nor is it necessary to the decision herein to do so, examine analytically the numerous provisions of that act. It is deemed sufficient to point out that it provides that the surveyor-general, who is by the act constituted the agent for the state for that purpose, shall locate the unsold portion of the five hundred thousand acre grant (sec. 11); that warrants issued in pursuance of the act of 1852 "shall be taken in payment of any part of the said grant," subject to the condition that said warrants shall be paid directly to the register of the state land office and shall be canceled by him before a certificate of purchase shall issue for the said lands (sec. 54); that there shall be issued duplicate warrants in case of the loss or destruction of the originals, the duplicate to be of the same validity and have the same force and effect as the original (sec. 59). The act, as shown above, contains the clause saving pre-existing rights acquired in the lands.

In *Bludworth v. Lake*, 33 Cal. 255, decided before the passage of the act of 1868, the supreme court said, quoting the syllabus: "When the state issues her land warrant and receives the sum of money required to be paid therefor, she thereby sells the amount of land specified in the warrant out of the five hundred thousand acres granted by the act of Congress, and authorizes the holder, as her agent, to locate the same upon any vacant lands belonging to the United States subject to such location. When this location is made, the locator thenceforth becomes the owner of the entire beneficial interest in the particular tract of land selected, and until the issuing of the patent the state holds the legal title in trust for the locator who has become the purchaser." This language can only mean that, while the particular tract or parcel of land out of the five hundred thousand acre grant so sold may not be known either to the state or the purchaser, at the time of the sale of the warrant, yet the amount of land

specified in the warrant is nevertheless sold to the purchaser by the state, and it remains with the purchaser to locate the warrant and thus acquire his right to a patent for the land so selected.

In view of the above-stated conclusion of the supreme court as to the legal effect of the sale of land warrants by the state issued by authority of the statute of 1852 or under any of the subsequent state legislation, of which conclusion the legislative branch of the state government is to be presumed to have had knowledge, particularly since the legislature had been for a number of prior years wrestling with the problem of a proper plan for the disposing of the government lands within its borders subject to location under state laws, it is (as counsel for appellants aptly suggest) inconceivable that the legislature would attempt, even if it had the rightful power to do so, to deprive holders of school-land warrants of the rights acquired and which they were authorized to exercise under prior statutes. But that the legislature intended to make no such attempt by the act of 1868, is plainly manifest, in our opinion, from the language of the several provisions of said act to which we have above referred. For instance, the act provides, as we have shown, that the surveyor-general, as *ex-officio* register of the state land office, shall act as the agent of the state for the location of the "unsold portion"—not the *unlocated* portion—of the five hundred thousand acre grant. By this language, the legislature expressly recognized and incorporated into the act of 1868 the doctrine laid down in *Bludworth v. Lake*, viz., that "when the state issues her land warrants and receives the sum of money required to be paid therefor, she *thereby sells* the amount of land specified in the warrant out of the five hundred thousand acres granted by the act of Congress." [4] Thus it is clear to our minds that the legislature did not intend, as counsel for respondent contend is true, by the act of 1868, to vest solely and exclusively in the surveyor-general the right to make school-land warrant selections; for if, as the supreme court declared to be true, the sale of the warrant constituted a sale by the state of the number of acres of land specified in the warrant, then it was a sale of land so specified for all time and unconditionally; and there was, therefore, nothing remaining for the purchaser to do but to locate the number of acres his warrant called for. Having bought and

paid for the land, there was no reason why his warrant should be presented to the surveyor-general as in payment for something he had already paid for. This view is fortified by the consideration that section 59 of the act of 1868, as we have seen, in authorizing the issuance of duplicate land warrants, in cases where the originals had been lost or destroyed, provides: "Any person making application for a duplicate school-land warrant, in lieu of one alleged to have been lost or destroyed, shall make satisfactory proof, by affidavit of himself and others, to the register of the state land office, that the party applying therefor is a *bona fide* owner of such warrant, that the same has not been located, and of the facts establishing the loss or destruction of the same, and shall file with the register of the state land office a good and sufficient bond, in form joint and several, with two or more sureties, to be approved by said register, payable to the state of California, in double the value of said school-land warrant, conditioned that the said warrant alleged to have been lost or destroyed shall not be presented for location." It is further provided that the duplicate warrant shall be of the same validity, force, and effect as the original. The language, "shall not be presented *for location*," implies that the legislature recognized all the rights acquired by purchasers of land warrants under previous statutes—not only the right to the number of acres of land designated in such warrants, but to locate the warrants in the manner prescribed by the statute by whose authority they were issued and sold. Again, if the language referred to is not sufficiently clear and explicit in disclosing the intention to preserve to purchasers of such warrants any right acquired under the warrants as indicated above, then it seems to us that that intention is made absolutely clear and unquestionable by the provision requiring the person applying for the duplicate warrant to furnish a bond conditioned that the lost or destroyed warrant shall not be presented for location. "If," as counsel for the appellants well inquire, "the legislature had intended, as claimed, to cut off the right of anyone other than the surveyor-general to make school-land warrant locations, why did it exact a bond that the warrant represented to be lost or destroyed would not be presented *for location*? What need was there for this requirement? Manifestly, no such bond would have been required if the legislature had lawfully terminated the

right to use the warrant for any purpose other than *as payment* on an application to purchase land forming part of the five hundred thousand acre grant, and we are told by respondent's counsel that it did lawfully terminate all other rights. The state needed no protection against an unauthorized use of a warrant. It could snap its fingers at that and entirely disregard it. Viewed in this way the exaction of the bond was a useless and vain thing. But we must not assume that the legislature had an idle or senseless purpose in making this enactment; that it required a bond against doing an act which it said could not be done and which, if done, would have no validity or effect anyway." To our minds, the idea was to provide against the contingency of the loss or destruction of the written evidence—the land warrant—of rights acquired from the state by a purchaser of the warrant, by substituting a duplicate for the lost or destroyed warrant having "the same validity and the *same force and effect* as the original"—that is to say, a duplicate warrant preserving to the purchaser of the original himself or his assigns to locate such warrant on the number of acres of land sold to him by the state and specified in the warrant. Or, as the same proposition was stated in *Stuart v. Haight*, 39 Cal. 87, 89:

"The design evidently had in view in the enactment of the statute was to provide for the relief of those who had purchased state land warrants, which, in some way, had become unavailable to them for the purposes for which they had been issued by the state. The intention was to relieve from loss the holder of the warrant which had been issued by the state and acquired by the purchaser in the expectation of being able to locate it on the lands which had been granted to her."

[5] Summarizing the situation, then, it is: That the act of 1868 expressly limits the right of the surveyor-general to locate lands comprised within the grant by Congress to the unsold portion thereof; that, by the same act, duplicate warrants in lieu of those lost or destroyed, having the same validity, the same force and the same effect or (we may add) scope, are authorized to be issued upon sufficient affidavits and the filing of a bond that the originals will not be presented *for location*; that the effect of selling the warrants was to sell to the purchasers of the warrants the amount of lands specified in the warrants sold. From all these consid-

ernations, we hold that it could not have been the intent of the legislature by the act of 1868 to deprive owners of pre-existing land warrants of the right themselves to locate said warrants as agents of the state.

[6] It is true that the act of 1868 provides that outstanding warrants shall be taken in payment of any part of the grant, but, considering that provision in connection with the other provisions of the said act which we have already considered and construed, we are led to the conclusion that it was intended only to be permissive—that is to say, that it was intended to confer upon owners of outstanding warrants the right, in addition to their pre-existing right to locate the warrants as agents of the state, to present the same as payment on applications to purchase lands embraced within the congressional grant. As we construe the provision, by comparison with other provisions of the act, it means this: That owners of such warrants may, in their discretion, present the same as payment on applications to purchase the lands, in which case the surveyor-general *shall* or *must* receive the same as such payment. The object of the provision referred to probably was, as counsel for the appellants suggest, not to destroy the right of location in the owners of the warrants, “but to hasten the redemption or cancellation of the outstanding warrants by allowing them to be used as cash,” thus, as stated, giving a further or additional right to the owners of the warrants.

[7] But, if there may be any question as to the correctness of the foregoing views regarding the matter in hand, a consideration of the saving clause of the act of 1868 will readily dissipate any doubt as to the proposition that, by said saving clause, the legislature intended to preserve to the purchasers of warrants issued and sold under the act of 1852 all the rights acquired by them by virtue of such warrants. This clause, it will be remembered, follows language in section 71 of the act repealing some twenty-seven statutes relating to the public lands of the state and regulating the disposal thereof, and declares that “the provisions of this act shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of any claimant under the state,” etc.

The contention of the respondent is, as to said clause, that it refers only to those rights under school-land warrants

which are vested—"that is, rights that arise out of the actual location of the warrants. In other words," further explains respondent, "the saving clause in the repealing words of the act of 1868 referred to accrued rights under located warrants and not to rights arising out of warrants still in circulation."

[8] But the first reply to this contention is that purchasers of school-land warrants issued and sold under the statutes of 1852 and 1853 acquired under such purchase vested rights (*Bludworth v. Lake, supra*)—that is, they thus acquired the indefeasible right to locate the warrants upon lands within the five hundred thousand acre grant. Indeed, the proposition may even be put in stronger form—they acquired a vested right to the amount of land specified in the warrants. The second reply to the construction respondent gives said clause is that, should it be sustained, it would be inconsistent with the provision in the statute that duplicate warrants should have the same validity, force, and effect as inhered in the originals. We have already shown that, while the legislature, prior to the enactment of the statute of 1868, had repealed the general procedure in the statute of 1852 for the disposal of the granted lands, it expressly preserved to purchasers of warrants issued under the latter act all the vital rights acquired by them under such purchases. (See said statutes, above cited and considered.) In adding to the statute of 1868 the saving clause under consideration, the legislature is to be presumed to have had in mind and considered the act of previous legislatures in preserving to purchasers of warrants under the statute of 1852 all the rights vested in them by and under the warrants sold by the state; and, therefore, reading, in view of that consideration, the language of the clause, "that the provisions of this act shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of *any claimant* under the state," the conclusion would seem irresistibly to follow that the intent at the bottom of said clause was to preserve to such purchasers every right acquired by them by reason of the purchase—that is to say, not only the right to the amount of lands specified in the warrants, but the further right given by the statute under which they were issued and sold themselves to locate such warrants as agents of the state. To give the clause referred to any other construction would be to deny to the purchasers of such warrants

a substantial right and one which, it can well be said, entered vitally into the consideration upon which they purchased the warrants.

The specific purpose of a saving clause in a statute is to preserve pre-existing rights. "It is generally employed," says Mr. Sutherland in his treatise on Statutory Construction, section 225, "to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights, penalties incurred and pending proceedings, dependent on the repealed statute." (See, also, sec. 167 of the same work; Black on Interpretation of Laws, p. 270.)

The statute of 1852 did not limit the time within which the warrants issued and sold by its authority were to be used in the manner prescribed by said act. The act of 1868 made radical changes in the system for the disposal of state lands acquired by grant from the general government through its Congress, and the legislature, by the saving clause of the act of 1868, certainly intended to say to purchasers of land warrants that they were to be permitted to utilize their warrants in the manner and according to the plan or procedure established by the law from which they secured their rights to portions of the grant made by Congress to the state. This conclusion is not only reasonable, but eminently just.

Thus we think we have shown that the legislature, in the place of attempting to repeal by the act of 1868 the previous statutes relating to the public lands of the state so as to destroy the right of purchasers of land warrants issued under the authority of the previous acts to locate, as agents of the state, such warrants, intended by said act to preserve said right to such purchasers, and that thereby it did do so. But it is to be further suggested that, even if such attempt were made by the legislature, it would be wholly futile. [9] The sale of the warrants by the state constituted a contract between the state and the purchasers of the warrants. This is true, although at the time of the sale the lands granted by Congress had not been listed to the state. The terms of the warrant were that the purchaser was entitled to locate the same in behalf of the state of California. The warrant constituted a contract of sale of the amount of land specified therein and which land was embraced within the grant to the state by Congress of five hundred thousand acres of land. (*Bludworth v. Lake, supra.*)

[10] Whether the purchaser had ever exercised his right under the contract is a matter of no consequence. He might have delayed locating the warrant until the entire congressional grant had been exhausted, and thus have lost his rights under his warrants, but this consideration would render the sale and the purchase none the less a contract of sale of the amount of land specified in the warrant between him and the state. As heretofore herein declared, the right thus given the purchaser to locate the warrant in behalf of the state, or as the state's agent, constituted a vital element or covenant of the contract of sale. We do not say that the purchaser, after the passage of the act of 1868, was himself compelled to locate the warrant to complete his right to a patent, but we do say that he was vested with the right to do so or to take that course to obtain the actual benefits of his contract. The legislature was, therefore, without the power to take that right from the purchaser. To do so would be impairing the obligation of a contract, a power which is expressly denied to the state by the tenth section of article I of the federal constitution. The legislature may amend the procedure or change the remedy whereby rights are judicially asserted, and such amendment or change may have a retroactive effect, except in those cases where the procedure or the remedy as amended or changed directly affects and impairs the right. (See *James v. Oakland Traction Co.*, 10 Cal. App. 785, 792, [103 Pac. 1082], and authorities therein cited.) As shown, the act of 1868, as construed by respondent, although it may be regarded, as all the previous statutes might have been, as involving largely a procedural scheme for acquiring ownership of or title to lands comprised within the grant from Congress, would result in divesting purchasers of land warrants under previous legislative acts of the vested right to locate their warrants in behalf of the state.

The cases cited by respondent upon the proposition under consideration are not in point. The case of *Campbell v. Wade*, 132 U. S. 34, [33 L. Ed. 240, 10 Sup. Ct. Rep. 9, see, also, *Rose's U. S. Notes*], so cited, was where, under a Texas statute, the sale of a portion of the vacant lands of that state, lying within certain counties, was authorized, upon a survey of any of the said lands by the person desiring to purchase the same and upon the payment into the state treasury of the purchase money therefor, when it became the duty of the com-

missioner of the general land office, upon the presentation to it of the receipt for said purchase money, to issue to the purchaser a patent for the land. The proposed purchaser applied to the surveyor of the county to have the lands applied for surveyed, the applicant paying the required fees for the filing of the application; but no survey was ever made, and before the expiration of the time within which the surveyor was authorized to make the survey the legislature of the state withdrew from sale all of the public lands mentioned in the act under which the applicant applied to purchase the lands. An action by the applicant against the surveyor to compel the latter by mandate to survey the lands which the former sought to purchase was brought, and found its way to the United States supreme court, before which it was contended that the petitioner for the mandate, by his application for a survey, had acquired a vested right in the lands he desired to purchase which could not be impaired by their subsequent withdrawal from sale. The court held that the position of petitioner was clearly untenable, saying: "The state was under no obligation to continue the law in force because of the application of anyone to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter, nor in the absence of other proceedings could it bind the state to sell the lands."

The case of *Shiver v. United States*, 159 U. S. 493, [40 L. Ed. 231, 16 Sup. Ct. Rep. 54, see, also, Rose's U. S. Notes], merely holds that a person who has entered a homestead under the homestead laws upon lands of the United States does not acquire a vested interest in such lands by a mere entry upon the lands and continued occupation and improvement thereof.

The distinction between these two cases and the one at bar is obvious. And the case of *Messenger v. Kingsbury*, 158 Cal. 611, [112 Pac. 65], also cited by respondent, very clearly points out the distinction.

[11] Some discussion is had in the briefs of the long delay after their purchase in locating the warrants in question, it being intimated that by reason of such delay Jackson was guilty of laches in exercising his rights under the warrants. But we regard this position as of absolutely no consequence. The state was not, and could not have been, prejudiced by

the delay. No rights as against the owners of these warrants could accrue to the state by reason of the delay. The warrants, or the amount of land specified therein, had been fully paid for and the state had the money. Moreover, as before suggested, there was no time limit fixed by the statute of 1852 within which the locations were to be made. Besides, it is alleged in the complaint, and not denied, that the lands upon which the locations were made were certified and listed to the state by the United States on the twenty-third day of January, 1901, as a part of the five hundred thousand acre grant, and that said listing and certification "was made under and in pursuance of said locations of said Jackson, and not otherwise, and that ever since said last-mentioned date said state has held the legal title to said listed lands in trust for said Henry Jackson." It may further be suggested that it is alleged in the complaint, and not denied, that Jackson's locations in 1893 were made with the consent of the register and receiver of the United States land office at San Francisco, and were finally approved and allowed by the commissioner of the general land office in 1900.

Thus we have given this appeal extended consideration. Indeed, we have perhaps written more than might by some be deemed to have been necessary. But the main question, as well as some of the subsidiary points, are important, and the latter, we think, called for considerable attention.

Our conclusion is, as is indicated by the discussion, that the court below committed error in awarding judgment to the defendant; for it is clear to our minds that the facts found by the court show that the appellants are entitled to judgment. The judgment appealed from, as has been shown, rests entirely upon the alleged "finding" that there was no law existing in the year 1893, when the locations in question were made, authorizing such location or locations made in the manner that these were. That "finding" is, obviously, a mere conclusion of law, and, as has been at least inferentially stated, is not supported by the *facts* found. Accordingly, the judgment appealed from is reversed, with directions to the court below to enter a judgment for and in favor of the appellants upon the facts as found.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on November 29, 1919.

Angellotti, C. J., Shaw, J., Wilbur, J., and Lennon, J., concurred.

[Crim. No. 659. Second Appellate District, Division One.—September 30, 1919.]

THE PEOPLE, Respondent, v. GEORGE A. FOX, Appellant.

[1] CRIMINAL LAW—EMBEZZLEMENT—INSTRUCTIONS.—It is the duty of the court in charging the jury to state to them all matters of law necessary for their information; and in this prosecution an instruction that "If you find from the evidence beyond a reasonable doubt that the defendant did, on or about the date charged in the information, fraudulently appropriate the moneys of" the complaining witness "after said moneys had been intrusted to him and that said moneys were appropriated to a use or purpose other than that for which such property was intrusted to him, you should find the defendant guilty of embezzlement as charged in the information," was a correct statement of the law, and clearly applicable to the theory of the prosecution as shown by the testimony of the complaining witness.

[2] ID.—PROSECUTION ON TWO DIFFERENT CHARGES—EVIDENCE ESTABLISHING EITHER ADMISSIBLE.—Where a defendant is charged in one count with the embezzlement of a given sum of money and in a second count with larceny of a like sum, any testimony tending to establish the essentials of either offense is proper.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge. Affirmed.

The facts are stated in the opinion of the court.

John L. Richardson, Charles E. Williams and T. E. Parke for Appellant.

U. S. Webb, Attorney-General, and Joseph L. Lewinsohn, Deputy Attorney-General, for Respondent.

SHAW, J.—By the first count of an information filed against defendant he was charged with the embezzlement of \$5,106.25; and by a second count therein he was charged with larceny of a like sum.

The trial resulted in his conviction of embezzlement, as charged in the first count, and his acquittal of the charge contained in the second count.

Judgment sentencing him to prison followed, from which and an order denying his motion for a new trial he has appealed.

Appellant complains of an instruction given to the jury as follows: "If you find from the evidence beyond a reasonable doubt that the defendant did, on or about the date charged in the information, fraudulently appropriate the moneys of Mrs. Anna G. Walters after said moneys had been intrusted to him and that said moneys were appropriated to a use or purpose other than that for which such property was intrusted to him, you should find the defendant guilty of embezzlement as charged in the information." While conceding this instruction correct as an abstract proposition of law, he insists that it was not applicable to the case, for the reason that defendant admitted the receipt of the money, which, according to his own testimony, was, with the consent and approval of the complaining witness, diverted from the purpose for which it was originally intrusted to him. The evidence of the prosecution, however, was to the effect that defendant by fraud and deceit induced the complaining witness to convey her property to him in order that he, as her agent, might to better advantage sell and dispose of the same, the proceeds of which sale he was to pay over and deliver to her, and that upon obtaining title to the property, consisting of a valuable orange grove, he exchanged it for an apartment house, the title to which was taken in his name, in addition to which he received thirteen thousand dollars in cash, and thereafter sold the apartment house for the sum of \$5,106.25, all of which latter sum he appropriated to his own use and refused to pay the same to his principal. It is true that defendant admitted the receipt of the money and, as to the charge of embezzlement, based his defense upon the ground, as shown by his own testimony, in contradiction of that of Mrs. Walters, that she consented to his use thereof for a purpose other than that originally agreed upon, and likewise

true that, at his request, the court, as applicable to such testimony, instructed the jury as follows: "If you believe from the evidence that Anna G. Walters voluntarily and of her own free will spent the \$5,106.25 described in the information, either on the defendant, or on herself, or on both of them, or if you believe that she voluntarily did so and that in either event she did not expect or intend to receive said moneys back again, or if she gave the money to him as a loan, or if you entertain a reasonable doubt in respect to the foregoing propositions, then I instruct you it is your duty to acquit the defendant." [1] It was the duty of the court "in charging the jury . . . to state to them all matters of law necessary for their information." (Pen. Code, sec. 1127.) The instruction complained of was a correct statement of the law, and clearly applicable to the theory of the prosecution as shown by the testimony of the complaining witness.

[2] It is also claimed that the court erred in its rulings upon the admission of testimony not pertinent to the charge upon which defendant was convicted. Conceding that some of the testimony complained of was improperly admitted in the prosecution of the charge of embezzlement, it was nevertheless competent as tending to prove the charge of larceny for which defendant was prosecuted, and to which a large part of the testimony claimed to have been erroneously admitted was directed. As shown by the record, the means whereby defendant obtained the money was a fraudulent scheme well calculated to deceive a weak-minded woman, and rob her of the property. Any testimony tending to establish the essentials of either offense was proper. As said by Mr. Underhill in his work on Criminal Evidence, section 88: "If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme." As clearly appears from the voluminous transcript, covering upward of one thousand three hundred pages, the successful conduct of the fraudulent transaction in which defendant was engaged covered a period of several months, during which time he committed acts con-

stituting other offenses than those charged. Such acts, however, were connected with and committed as part of, and in furtherance of, the larceny and embezzlement, on which charges he was tried.

To our minds, an examination of the entire record leaves no doubt as to defendant's guilt, and had the rulings complained of been otherwise, the jury must have necessarily reached a like verdict; hence in no event can it be said there was a miscarriage of justice.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2934. Second Appellate District, Division Two.—September 30, 1919.]

CHESTER A. BELL, Respondent, v. GERMAN AMERICAN TRUST & SAVINGS BANK (a Corporation), Appellant.

- [1] **EVIDENCE—JUDGMENT-ROLL IN PRIOR ACTION—PROOF OF OWNERSHIP OF NOTE.**—In an action by the owner of a promissory note against a bank to recover the amount of the note, which had been deposited with such bank for collection, which amount the bank had paid to the payee named therein instead of to the plaintiff, the judgment-roll in a prior action by plaintiff against such payee and the bank, brought after the delivery of such note to the bank for collection and the payment of the proceeds to the nominal payee, and in which it was determined that plaintiff was the owner of such note, while not competent evidence to show that the bank had notice of plaintiff's beneficial interest in such note at the time it received the note, made the collections, and paid over the proceeds, was competent evidence, and a determination of the fact, that plaintiff was the owner thereof.
- [2] **BANKS AND BANKING—DELIVERY OF NOTE FOR COLLECTION—NOTICE OF OWNERSHIP—PAYMENT TO NOMINAL PAYEE—LIABILITY.**—Where such bank at all times had actual notice of plaintiff's possession and claim of ownership of the note and that he was depositing it for collection on his own account and for his own benefit, although it was not indorsed by the payee named therein, it acted at its peril in accounting for the collections to such nominal payee, without notice to plaintiff. Such failure of the bank to account to plaintiff for the collections made could only be justified by a showing that plaintiff was not entitled to the money.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Affirmed.

The facts are stated in the opinion of the court.

Haas & Dunnigan for Appellant.

Emmet H. Wilson for Respondent.

SLOANE, J.—This appeal is by the defendant from a money judgment against it for \$2,655.76 and costs. The facts, briefly stated, as found by the court, as shown by the evidence, and as substantially conceded by appellant in its opening brief, are as follows:

The plaintiff, by his attorney, left with the defendant bank for collection a promissory note executed by one F. W. Carlisle and payable to Mary A. Bell. The collection clerk of the bank, who received the note, was informed at the time that while the note was by its terms payable to Mary A. Bell, who is a sister of plaintiff, it was actually the property of the plaintiff and respondent, Chester A. Bell; and that when the money on the note was collected the same was to be deposited to the account of said Chester A. Bell. On receiving the note, the representative of the bank stated that it would be necessary to have the payee named in the note sign some paper of authorization, and the bank, by its agent, thereupon undertook to write to said Mary A. Bell. There was considerable correspondence and delay before the bank heard from her; and when she did communicate with the bank, she demanded that the money on the note, when collected, be sent to her in New York. Without notifying the respondent or his attorney that Mary A. Bell claimed the beneficial interest in the proceeds of the note, and repudiated respondent's claim of ownership, the bank collected the amount covered by the judgment and paid it to Mary A. Bell.

The liability of the bank in this action depends upon two conditions: First, the beneficial ownership of the note in question by the plaintiff; and, second, notice to the bank at the time it accepted the note for collection from plaintiff's attorney, or at least before it parted with the money collected, that the plaintiff claimed such ownership.

[1] That the plaintiff owned the note, and that it was made payable to his sister, Mary A. Bell, as his trustee only, was established by testimony of plaintiff and his attorney on the trial, as well as by the judgment-roll (admitted in evidence) in the case of *Bell v. Bell*—an action brought by the plaintiff here against his sister and the defendant bank to determine the ownership of the note and of the moneys collected thereon. The judgment in that action decreed that the respondent here owned the note, that Mary A. Bell was merely named as a trustee, and that the defendant bank surrender the note to plaintiff. It appears that at the time the suit was commenced the bank had already collected this money and paid it over to Mary A. Bell. The record, therefore, was not competent evidence to show that the bank, at the time it received the note, made the collections and paid over the proceeds, had notice that the plaintiff, Chester A. Bell, claimed the beneficial interest in the note and collections; but it was competent evidence, and a determination of the fact, that the plaintiff was the owner of the note, and that is all the record seems to have been received in evidence for.

[2] That the bank at all times had actual notice, as found by the trial court in this case, of plaintiff's possession and claim of ownership, and that he was depositing the note for collection on his own account and for his own benefit, we think is clear from the direct testimony, as well as from evidence contained in some of the bank's correspondence relating to the matter. Receiving the note under these conditions from the plaintiff, the bank, in accounting for the collections to the nominal payee, without notice to plaintiff, acted at its peril. It may have concluded and believed that Mary A. Bell, the person named as payee, was entitled to the proceeds of the note, but there is no justification in the evidence for the contention that the plaintiff, or his agent, misled the bank, either by act or omission, or failed to disclose that the note was being deposited in plaintiff's behalf. The failure of the bank to account to plaintiff for the collections made could only be justified by a showing that plaintiff was not entitled to the money.

Judgment affirmed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 2326. Second Appellate District, Division One.—October 2, 1919.]

WILLIAM B. EDWARDS, Respondent, v. PATRICK H. BODKIN, Appellant.

- [1] **FORCIBLE ENTRY—ESSENTIAL ELEMENTS.**—Under section 1159 of the Code of Civil Procedure, a person is not guilty of forcible entry where his entry upon the premises is not accompanied by any kind of violence or circumstances of terror, and he does not turn out by force, threats, or menacing conduct the party in possession.
- [2] **FORCIBLE DETAINER—UNLAWFUL ENTRY—NECESSITY FOR DEMAND FOR POSSESSION.**—Even though a person's entry upon the premises is an unlawful entry made during the absence of the occupant, an action of forcible detainer cannot be maintained against him, under subdivision 2 of section 1160 of the Code of Civil Procedure, unless the former occupant has made demand for the surrender of the premises and he, for the period of five days, has refused to surrender the same.
- [3] **FORCIBLE ENTRY AND DETAINER—POSSESSION NOT RECOVERED—DAMAGES.**—In an action in forcible entry or forcible detainer the plaintiff is not entitled to recover damages unless he recovers the possession of the premises in controversy.

APPEAL from a judgment of the Superior Court of Riverside County. Hugh H. Craig, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Duke Stone for Appellant.

William B. Edwards, in pro. per., for Respondent.

CONREY, P. J.—The complaint stated a cause of action in forcible detainer. The trial court in its decision of the case found that on or about December 17, 1912, the defendant unlawfully *and forcibly* entered upon the described premises. The complaint alleged an unlawful entry during the absence of the plaintiff, but did not allege a forcible entry. The

1. Threats and display of force without actual force as constituting forcible entry, note, 15 Ann. Cas. 804.

2. Mere occupancy or personal presence as possession sufficient to warrant action for forcible entry and detainer, note, 21 Ann. Cas. 1226.

complaint also alleged, and the court found it to be a fact, that on said seventeenth day of December the plaintiff made demand in writing upon the defendant to deliver to the plaintiff the possession of said premises, and that the defendant refused for a period of five days thereafter to surrender possession thereof to the plaintiff; the court did not find that the entry was made during the absence of the plaintiff, but that fact was not denied.

Forcible entry is defined as follows (Code Civ. Proc., sec. 1159): "Every person is guilty of a forcible entry who either—

"1. By . . . any kind of violence or circumstance of terror enters upon or into any real property; or,

"2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession."

[1] There is no evidence to show that defendant's entry upon the premises on the seventeenth day of December, 1912, was accompanied by any kind of violence or circumstance of terror, or that the defendant turned out by force, threats, or menacing conduct the party in possession. It follows that there was no forcible entry.

At the trial evidence was produced showing that the defendant had also entered upon the land on the twenty-third day of November, 1912, and remained there for a few hours. The evidence does not show where the plaintiff was at the time of such entry, but it does show that a short time thereafter, and on the same day, the plaintiff appeared on the premises accompanied by a constable, by whom the defendant was arrested. Defendant's occupancy at that time continued for only a few hours, and he did not enter again until the seventeenth day of December following. We have carefully examined the evidence showing the circumstances of said entry of November 23, 1912, and we are satisfied that it is not sufficient to support the claim of forcible entry at that time.

If this action can be maintained at all it must be as an action of forcible detainer under subdivision 2 of section 1160 of the Code of Civil Procedure. According to that section, a person is guilty of forcible detainer who, "during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the

surrender thereof, for the period of five days, refuses to surrender the same to such former occupant." [2] If it be granted that defendant's entry under the circumstances shown by the evidence herein was an unlawful entry made during the absence of the occupant, nevertheless the action must fail because there is no evidence sufficient to support the finding of a demand made for the surrender of those premises. The plaintiff testified that on the evening of December 17, 1912, he gave to the defendant a copy of "a notice." Neither the notice nor any copy thereof was produced to the court, and the plaintiff did not testify to the contents of the so-called notice. Instead of such evidence, the plaintiff called as his own witness the defendant, who testified that on the evening of December 17, 1912, the plaintiff served on him "some kind of a notice." Being asked to state the contents of the notice, he replied: "The notice said that he wanted me to leave there and not contaminate the vicinity with my presence. That was the words." This is all of the evidence of any notice served by the plaintiff upon the defendant. So far as appears from this evidence, the property in question was not mentioned in the notice, nor was any demand made that the defendant surrender the same.

During the pendency of this action and prior to the trial thereof defendant Bodkin, as plaintiff in an action of ejectment against Edwards, obtained a judgment against Edwards for possession of the property described in the complaint in this action. At the time of trial of this action that judgment had become final, and the same was introduced in evidence herein by the defendant Bodkin. It was therein determined that at all times after June 1, 1912, Bodkin was the owner and entitled to possession of the land described, which was the same land described in the complaint in this action. Presumably by reason of that judgment, the court in this present action refused to award judgment for possession in favor of plaintiff Edwards, but granted judgment for damages, as for a period of forcible detainer, down to the time of entry of the judgment in the ejectment case. If the court was right in refusing to award possession to the plaintiff, it is doubtful whether damages could be separately granted. [3] In *Brawley v. Risdon Iron Works*, 38 Cal. 676, the court said that in an action of forcible entry or forcible detainer the substance of the recovery, when the

plaintiff is successful in the action, is the possession of the premises. "Damages for the forcible entry are not awarded, unless the plaintiff recovers the possession of the premises in controversy."

The judgment is reversed.

Shaw, J., and James, J., concurred.

[Civ. No. 3040. First Appellate District, Division Two.—October 2, 1919.]

KEMP J. WINKLER, an Infant, etc., Appellant, v. **LOS ANGELES INVESTMENT COMPANY** (a Corporation), Respondent; and **LOIS M. WINKLER**, an Infant, etc., Appellant, v. **LOS ANGELES INVESTMENT COMPANY** (a Corporation), Respondent.

[1] **MINORS—DISAFFIRMANCE OF CONTRACT.**—Under section 35 of the Civil Code, contract for the purchase of corporate stock, when made by minors under the age of eighteen years, may be disaffirmed by them and they thereby relieved from any further burdens under them.

[2] **ID.—CONTRACT MADE BY FATHER WITHOUT KNOWLEDGE OR CONSENT OF MINORS—RIGHT OF DISAFFIRMANCE.**—Where the father of certain minors to whom had been delivered certain shares of stock to be invested and reinvested by him for the purpose of providing means for their education, with the consent of the donor disposed of all the securities held by him, and, without the knowledge or consent of the minors, purchased certain shares of stock in a given corporation, the names of the minors being signed to the contracts of purchase and certain promissory notes by the father without their knowledge or consent, and the stock certificates being issued in their names at the father's request and without their knowledge or consent, such contracts must be deemed the contracts of the father, rather than of the minors, and therefore not subject to disaffirmance by them.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

Wm. M. Morse, Jr., and F. M. Johnstone for Appellant.

Flint & Jutten, H. S. MacKay, Jr., Ed. R. Brainerd, Jr.,
Wm. R. Flint and J. H. Schenck for Respondent.

NOURSE, J.—George C. Kemp, guardian *ad litem* for Kemp J. Winkler and Lois M. Winkler, both minors, instituted two separate actions in the superior court on behalf of said minors to recover back money paid for the purchase of stock in the defendant corporation. The actions were tried jointly, and by stipulation are brought to this court on one record. It is alleged that both of the minors were under the age of sixteen years when the actions were commenced; that at different times between the eighth day of April, 1910, and the twenty-fifth day of April, 1913, they purchased shares of stock from the defendant corporation, and that prior to the commencement of the action each of the defendants disaffirmed the contracts and demanded the return of the money paid. All of the allegations of the complaints were denied by the defendant, and the court found that it was not true that the plaintiffs entered into any agreement whereby defendant sold and plaintiffs bought shares of stock in said corporation, and that it was not true that the plaintiffs paid any sum of money for said stock or that they disaffirmed any contracts with the defendant. These findings constitute the only assignment of error upon this appeal, appellants arguing that the evidence is not sufficient to support them.

The material facts are that when each of the minors was about two years of age their grandfather, George C. Kemp, delivered to their father, J. H. Winkler, shares of stock of the value of five hundred dollars for each, with the intention on the part of the grandfather to make a gift of this stock to each minor, to be held by their father and invested and reinvested by him for the purpose of providing means for their education. From time to time, with the consent of said George C. Kemp, J. H. Winkler sold the stock and invested the proceeds of the sales by loaning some and investing the balance in other stocks. From these investments the original gifts increased from five hundred dollars to \$746.43 in the case of Kemp J. Winkler, and to \$1,269.20 in the case of Lois M. Winkler. During the period from 1910 to 1913 the father of the minors, with the consent of the grandfather,

disposed of all of the securities held by him for the two minors, and, without the knowledge or consent of the minors, purchased certain shares of stock of the defendant corporation. Certificates of stock were issued in the name of the minors, and thereafter dividends were made by checks drawn in their names. These checks were all indorsed for payment by the minor in whose name they were drawn and by J. H. Winkler, who received the money. Prior to the commencement of the action a notice of rescission was given to the defendant by the attorneys for the minors upon the ground that the sale of the stock to the minors was a fraud upon them because of misrepresentations as to the value of the stock on the part of the agents of defendant corporation. The action was tried upon the theory that the contracts for the purchase of the stock were the contracts of the minors made while they were under the age of eighteen years, and that this notice of rescission was in effect a notice of disaffirmance of these contracts.

There is no conflict of evidence as to the manner in which the purchases of the stock were made. It appears that the grandfather had great faith in the value of the stock and frequently urged the father to dispose of the securities which he held for the minors and to invest the proceeds thereof in the stock of this corporation. This was done without the knowledge or consent of the minors. The names of the minors were signed to the contracts of purchase and certain promissory notes by the father without their knowledge or consent, and the stock certificates were issued in their names at the father's request and without their knowledge or consent.

[1] Preliminarily, it may be said that, under section 35 of the Civil Code, if the contracts of purchase had been actually made by the minors, they could disaffirm and be relieved from any further burdens under them. [2] But in this case the minors did not make any contract, either individually or by agent—first, because they had no knowledge of the execution of any contract, and, second, because they could not give a delegation of power to the father to contract for them. (Civ. Code, sec. 33.) The contracts having clearly been made by the father without the knowledge of the minors, they could become the contracts of the minors only through the adoption of the action of the father, and this could be done only upon the theory that the minors thereby retrospectively made the

father their agent. This could not be done under our statute, and the contracts must be deemed, therefore, to be contracts of the father rather than of the minors.

Though these are the issues made by the pleadings, counsel argue at length as to the power and liability of the father as trustee for the minors. It would seem to be apparent that such was the relation of the father to the minors, and that, occupying such position, his powers as to the investment and reinvestment of the funds held by him as such trustee depend upon the terms and conditions imposed by the trustor. But the question of such powers and liability is not put in issue in this case.

The trial court properly held that the contracts were not made by the minors.

The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2635. First Appellate District, Division Two.—October 2, 1919.]

BEN E. TORMEY, Appellant, v. **BELINDA P. McINTOSH**
et al., Respondents.

- [1] **ATTACHMENTS—BOND FOR RELEASE OF—SUBSEQUENT BANKRUPTCY OF DEFENDANT.**—Where a bond is executed for the release of an attachment, the subsequent bankruptcy of the attachment defendant will not relieve the bondsmen from their liability.
- [2] **ID.—PURPOSE OF BOND—BY WHOM GIVEN—RECITALS IN—EVIDENCE—ESTOPPEL.**—The recitals of a bond given pursuant to the provisions of section 540 of the Code of Civil Procedure are conclusive as between the parties thereto; and where such a bond purports to be authorized and signed by the attachment defendant in compliance with the statute and recites that "whereas the said defendant . . . is desirous of giving the undertaking mentioned in the writ [of attachment], now, therefore, the undersigned," etc., in an action thereon, the bondsmen may not by their testimony show that the

1. Discharge of principal in bankruptcy as releasing surety on attachment bond, notes, 15 Ann. Cas. 956; 14 L. R. A. (N. S.) 507; 28 L. R. A. (N. S.) 234.

bond was not given by the defendant in the attachment suit for his benefit, but was given by them to protect their personal interest in the property attached.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge. Reversed.

The facts are stated in the opinion of the court.

Milton Newmark and Clarence A. Shuey for Appellant.

J. Oscar Goldstein for Respondents.

LANGDON, P. J.—This is an appeal from a judgment for the defendants in an action brought against them as sureties upon a bond given pursuant to the provisions of section 540 of the Code of Civil Procedure. In 1912, plaintiff began an action in the superior court for Butte County against one Frank N. Miller, seeking to recover one thousand two hundred dollars for merchandise sold and delivered to him. At the time of the commencement of the suit, a writ of attachment was issued and placed in the hands of the sheriff for execution. The sheriff levied upon a stock of merchandise in a store in Chico, which was the property of the defendant in that action. The defendants in the present action executed a bond meeting the requirements of section 540 of the Code of Civil Procedure, which is the bond sued upon in the present action. Upon receipt of the bond, the sheriff released the property which he had seized. Subsequently, Miller was adjudged a bankrupt and in the course of the administration of his property in the bankruptcy court plaintiff received a dividend of something over three hundred dollars, which amount was credited on Miller's account. Thereafter, the defendant in the attachment suit filed a supplemental answer setting up his discharge in bankruptcy. Plaintiff asked for a judgment against the defendant for the balance due, in order that he might be enabled to enforce his rights against the sureties on the bond. He asked that judgment be entered in his favor with a perpetual stay of execution against the property of Miller. The superior court gave judgment for the defendant, from which judgment an appeal was prosecuted, and said judgment reversed. The

superior court then rendered its judgment in favor of the plaintiff in the sum of \$875.30 with a perpetual stay of execution against the property of Miller. Demand was made upon the sureties, who refused to pay, and the present action was brought against them, in which action judgment was rendered in their favor.

[1] The appellant argues at some length and cites numerous cases in support of the proposition that the subsequent bankruptcy of the attachment defendant did not relieve the bondsmen from their liability. It is unnecessary for us to discuss this point here, because it is conceded by respondents in their brief that the subsequent bankruptcy of Miller would not in itself release the defendants in the present action, if there were no other valid defenses to the bond.

[2] There are several points made in the briefs under different subdivisions, but they are all included in the main question presented. The record presents a conflict in the evidence on certain matters, arising by reason of the fact that the defendant, Hazel Miller, testified in direct contradiction to some of the recitals of the bond she had executed. The findings of the trial court on such matters are in direct conflict with the recitals of the attachment bond given by the defendants. The inquiry must then be, whether under the facts of this case the defendants may contradict by their testimony the positive recitals of the bond, which recitals they represented to the plaintiff to be true, and upon the strength of which the plaintiff relinquished what was at the time a very valuable right.

At the time the bond was given, the defendant, McIntosh, was the mother-in-law of Miller, and the defendant, Hazel P. Miller, was his wife. It appears that Mrs. Miller had loaned her husband about two thousand five hundred dollars, which had been used by him in purchasing the store, and that he had promised to repay this amount to her. She testified that at the time the attachment was threatened she and her husband were having domestic troubles; that her husband had gone to San Francisco, and she did not know where he was; that when she received notice of the contemplated attachment, she was ill at her mother's home; that she and her mother signed the bond of their own motion, upon the advice of their attorney and without any request from Miller so to do; that said bond was signed for the purpose of protect-

ing the interest that she (Mrs. Miller) had in the store; that the property was attached, and later released by the sheriff after he received the bond, and that she was in the store when the sheriff released it from the attachment. Upon this testimony, as against the positive recitals of the bond, as found by the court, the defendants base their argument that the bond was not given by the defendant in the attachment suit for his benefit, but was given by persons having no right under the statute to give such a bond, and for the benefit of such persons alone. The trial court accepted this view and found in accordance therewith. The bond itself is signed not only by the sureties, but by Frank N. Miller himself. It recites that "whereas the said defendant, Frank N. Miller, is desirous of giving the undertaking mentioned in the writ, now, therefore, the undersigned," etc. There is in the record the testimony of Guy R. Kennedy, identifying the signature of Frank Miller upon the bond, and this witness also stated that he saw Miller in Chico between the time the writ was issued and the bond was given. Mrs. Miller herself admits that the signature upon the bond looks like the signature of her former husband. The decisions of this state are to the effect that the recitals of such a bond are conclusive as between the parties thereto. (*Pierce v. Whiting*, 63 Cal. 540; *Smith v. Fargo*, 57 Cal. 159; *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 744, [91 Pac. 416]; *McMillan v. Dana*, 18 Cal. 346.) The facts of this case are such as to call strongly for the application of the principle announced in the foregoing cases. Taking defendants' view of the evidence, we have a case where Mrs. Miller was seeking an advantage to herself—seeking to protect her interest in the property. She claims now that she had no right to protect this interest by furnishing an attachment bond of her own motion. Let us assume that she had not, and that the only right of this kind was in the defendant in the attachment suit, Frank Miller. If, then, this is assumed to be the law, we must also assume that such facts were known to her and her attorney. But she nevertheless caused a bond to be drawn by her attorney which purported to be authorized by Miller, and in form complied with the statutory bond which he might have furnished. She signed this bond; it was given to the sheriff. The record is silent as to who actually gave the bond to the sheriff, but we will assume that it was regularly

given to him by a person authorized to do so. The bond was signed by Frank Miller; the property was released under said bond. The plaintiff in the attachment suit relied upon the representations made in the bond. Mrs. Miller accepted the release of the property; she knew it had been released in reliance upon the bond. Later, when called upon to respond upon the bond, she attempted to contradict the very allegations upon which she secured the release of the attached property. We must conclude that though the facts be as found by the trial court, these defendants are nevertheless estopped by the recitals of the bond to prove such facts in contradiction of such recitals. The findings of the trial court upon which the judgment is based are findings which have no support except in this testimony on behalf of the defendants. The plaintiff objected to the introduction of such evidence and his objections were overruled. This ruling was error; the testimony should not have been admitted, and if it is ignored, there is no evidence in the record to sustain the findings upon which the judgment was based.

The case of *Thayer v. Braden*, 27 Cal. App. 435, [150 Pac. 653], relied upon by respondents, is not inconsistent with the views herein announced. The question involved here does not arise in that case.

As to the contention that the bond was given to prevent an attachment and not to release one, the case of *Preston v. Hood*, 64 Cal. 405, [1 Pac. 487], disposes of that contention.

The judgment is reversed.

Brittain, J., and Nourse, J., concurred.

[Civ. No. 2930. Second Appellate District, Division Two.—October 3, 1919.]

FRANK HELME, Respondent, v. GREAT WESTERN MILLING COMPANY (a Corporation), Appellant.

- [1] **WORKMEN'S COMPENSATION ACT—SCOPE OF EMPLOYMENT—EVIDENCE—FINDING.**—In this action for damages for personal injuries sustained while attempting to replace a belt on the pulley of a bran-packing machine, while the plaintiff's evidence as to the scope of his employment was too unsatisfactory, in view of the evidence of other witnesses to the effect that it was not unusual for a bran-packer to replace the belt when it slipped off, the jury was warranted in concluding that plaintiff was acting within the scope of his duties when he undertook to put the belt back on to the pulley.
- [2] **ID.—REMEDY OF INJURED EMPLOYEE—WHEN ACTION FOR DAMAGES MAINTAINABLE.**—The remedy of compensation afforded by the Workmen's Compensation, Insurance and Safety Act is exclusive of all other statutory or common-law remedies, except in the one case provided by subdivision "b" of section 12. By that subdivision it is provided that an injured employee, instead of presenting to the commission his claim for compensation as provided by the act, may, at his option, maintain in the courts an action at law against his employer to recover damages where all the three following elements coexist: (1) When the injury is caused by the employer's gross negligence or willful misconduct; (2) when the act or failure to act which is the cause of the injury is the personal act or failure to act on the part of the employer himself, or, if the employer be a corporation, on the part of an elective officer or officers thereof; and (3) when the act or failure to act which is the cause of the injury indicates a willful disregard of the life, limb, or bodily safety of the employees.
- [3] **ID.—FAILURE OF EMPLOYER TO INCLOSE GEARS—ACTION FOR DAMAGES—ESSENTIALS TO RECOVERY—PLEADING AND PROOF.**—Where the failure to act, which is charged as the cause of the injury, was

1. What is accident arising out of, and in course of, employment within meaning of Workmen's Compensation Act, notes, *Ann. Cas.* 1913C, 4; *Ann. Cas.* 1914B, 498; *Ann. Cas.* 1916B, 1293; *Ann. Cas.* 1918B, 362; *L. R. A.* 1916A, 40, 232; *L. R. A.* 1917D, 114; *L. R. A.* 1918F, 896.

3. Negligence precluding recovery under Workmen's Compensation Act, note, *Ann. Cas.* 1913C, 17.

"Serious and willful misconduct" as affecting recovery under Workmen's Compensation Act, notes, *Ann. Cas.* 1916A, 790; *L. R. A.* 1916A, 75, 243, 355; *L. R. A.* 1917D, 133.

the failure to inclose certain gears in a housing, or otherwise to keep them from being exposed, to entitle the plaintiff in an action at law against the employer to recover he must allege, and, by a preponderance of the evidence, prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "willful misconduct"; (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of the defendant corporation as, for example, a director or directors; and (3) that such failure to house the gears indicates a willful disregard of the life, limb, and bodily safety of defendant's employees.

- [4] **ID.—FAILURE TO COMPLY WITH COMMISSION'S ORDERS—GROSS NEGLIGENCE—WILLFUL MISCONDUCT.**—Unless, by failing to house such gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the Industrial Accident Commission, or with some safety requirement expressly defined and provided for by the act itself, it cannot successfully be claimed that defendant was guilty of either "gross negligence" or "willful misconduct."
- [5] **ID.—GROSS NEGLIGENCE DEFINED.**—Gross negligence is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequences, without the exertion of effort to avoid it.
- [6] **ID.—WILLFUL MISCONDUCT DEFINED.**—Willful misconduct means something different from and more than negligence, however gross. The mere failure to perform a statutory duty is not, alone, willful misconduct. To constitute willful misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with conscious failure to act to the end of averting injury.
- [7] **ID.—RECOMMENDATIONS OF ENGINEER NOT SAFETY ORDERS.**—Recommendations by a safety engineer representing the Industrial Accident Commission that certain changes be made in a given plant cannot be deemed the equivalent of an order made and entered by the commission itself and served on the employer, as contemplated by the Workmen's Compensation, Insurance and Safety Act.
- [8] **ID.—USE OF SAFETY DEVICES—ABSENCE OF ORDERS—GENERAL REQUIREMENTS OF ACT.**—In the absence of any general or special order given and made by the commission in the mode and manner provided by the act, an employer's statutory duty, under the general requirements of the act itself, is to use such devices and safeguards as are "reasonably adequate" to render the place of

employment safe, and to have its place of employment as free from danger to the life or safety of its employees "as the nature of the employment will *reasonably* permit."

- [9] **ID.—DEGREE OF CARE REQUIRED—ERRONEOUS INSTRUCTION.**—In an action for damages for personal injuries sustained while attempting to replace a belt on the pulley of a bran-packing machine, the plaintiff's arm having been caught in certain gears, an instruction that "if you find from a preponderance of the evidence in this case that the plaintiff at the time of the injury was acting in the course of his employment, then, if such gears constituted a source of danger to the life or safety of the plaintiff, the defendant owed to the plaintiff the duty of providing and maintaining over the gears in question such safety devices or appliances as would tend to mitigate or prevent the danger to plaintiff from contact thereof," exacts from the defendant a greater degree of care than is required by the Workmen's Compensation, Insurance and Safety Act.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Albert M. Norton, D. W. Boden and Haas & Dunnigan for Appellant.

H. Eugene Wassell and Jas. E. Degnan for Respondent.

FINLAYSON, P. J.—In this action for personal injuries, sustained while in defendant's employ, plaintiff, after a trial before a jury and a verdict in his favor, recovered a judgment for three thousand five hundred dollars, from which defendant appeals. The action was brought under subdivision "b" of section 12 of the Workmen's Compensation, Insurance and Safety Act of 1913. (Stats. 1913, p. 283.) Appellant complains, *inter alia*, of certain instructions given to the jury.

A few days prior to April 14, 1915, plaintiff was employed by defendant as a bran-packer. In operating the bran-packing machine, the bran-packer discharges the various kinds of grain into four holes or hoppers in the floor. The grain passes thence to a mixing-box in the floor beneath, from which it is discharged into an auger that grinds the whole mass into a mixture that is conveyed by elevator to a machine called the "bran-packer," from which it is discharged into sacks.

According to plaintiff's testimony, he was instructed to keep the feed going through the mixer, to keep the mixer running, to keep the machinery going, so that the grain would not clog. On April 14, 1915, while operating the bran-packing machine, plaintiff discovered that the grain was not feeding into the hoppers. Upon going into the basement to discover the cause of the trouble, he found that the screw into which the hoppers fed was clogged, and that that had caused the belt that operates the screw to come off the pulley. In attempting to replace this belt, plaintiff's arm was caught in certain gears, and the injury of which he complains was thus inflicted. The gears which caused the injury were not housed, but were entirely exposed. They were about five feet eight inches above the basement floor, and located within a few inches of the pulley that controls the belt which operates the auger in the mixer. The belt, when in operation, was about five feet four inches above the floor. The basement was poorly lighted, in consequence of which the presence of the gears could not readily be detected.

[1] Appellant urges that the evidence fails to show that respondent was acting within the scope of his employment when he undertook to replace the belt. Respondent's evidence on this branch of his case is none too satisfactory, but, on the whole case, we think that, in view of the testimony of other witnesses to the effect that it was not unusual for a bran-packer to replace the belt when it slipped off, the jury was warranted in concluding that respondent was acting within the scope of his duties when he undertook to put the belt back on to the pulley. The most serious question in the case arises out of certain instructions given to the jury.

[2] The remedy of compensation afforded by the Workmen's Compensation, Insurance and Safety Act is exclusive of all other statutory or common-law remedies, except in the one case provided by subdivision "b" of section 12. By that subdivision it is provided that an injured employee, instead of presenting to the commission his claim for compensation as provided by the act, may, at his option, maintain in the courts an action at law against his employer to recover damages where all the three following elements co-exist: (1) When the injury is caused by the employer's gross negligence or willful misconduct; (2) when the act or failure to act which is the cause of the injury is the personal

act or failure to act on the part of the employer himself, or, if the employer be a corporation, on the part of an elective officer or officers thereof; and (3) when the act or failure to act which is the cause of the injury indicates a willful disregard of the life, limb or bodily safety of the employees.

[3] Here the failure to act, which is charged as the cause of the injury, was the failure to inclose the gears in a housing, or otherwise to keep them from being exposed. Therefore, to entitle plaintiff to recover in this action he must allege, and, by a preponderance of the evidence, prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "willful misconduct"; (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of the defendant corporation, as, for example, a director or directors; and (3) that such failure to house the gears indicates a willful disregard of the life, limb, and bodily safety of defendant's employees.

[4] Unless, by failing to house the gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the Industrial Accident Commission, or with some safety requirement expressly defined and provided for by the act itself, it cannot successfully be claimed that defendant was guilty of either "gross negligence" or "willful misconduct."

[5] "Gross negligence" is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequence, without the exertion of effort to avoid it. (*Reddington v. Pacific P. T. Co.*, 107 Cal. 324, [48 Am. St. Rep. 132, 40 Pac. 432]; *Coit v. Western Union Tel. Co.*, 130 Cal. 664, [80 Am. St. Rep. 153, 53 L. R. A. 678, 63 Pac. 83]; *Watermolen v. Fox River etc. Co.*, 110 Wis. 153, [85 N. W. 663]; *Astin v. Chicago etc. Co.*, 143 Wis. 477, [31 L. R. A. (N. S.) 158, 128 N. W. 265]; 20 R. C. L. 23.) While, in a case of gross negligence, various terms have been used to express the mental state of the actor, the idea attempted to be conveyed seems to be that the act done or omitted to be done was done or omitted willfully and intentionally. (20 R. C. L. 23.) In *Astin v. Chicago etc. Co.*, *supra*, the Wisconsin supreme court says that "gross"

negligence is not characterized by inadvertence, but "by the absence of any care on the part of a person having a duty to perform to avoid inflicting an injury to the person or property rights of another, by recklessly or wantonly acting or failing to act to avoid doing such injury, evincing such an utter disregard of consequences as to suggest some degree of intent to cause such injury."

Without undertaking to state the evidence at length or to discuss it at large, let it suffice to say that unless it appears that defendant consciously violated some order of the commission or some particular safety provision of the act itself, it was not guilty of "gross" negligence, simply because it failed to house the gears with which plaintiff brought his arm in contact when attempting to replace the belt. The mere failure to keep the gears in a housing, apart from any willful disregard of some order of the commission or of some particular safety provision of the act itself, does not evince such an utter disregard of consequences as to suggest some degree of intent to cause the injury, or to justify the belief that there was a conscious indifference to consequences.

[6] "Willful misconduct" means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described by the supreme court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences." (*In re Burns*, 218 Mass. 8, [Ann. Cas. 1916A, 787, 105 N. E. 601].) The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. (*Smith v. Central etc. Ry. Co.*, 165 Ala. 407, [51 South. 792].)

Measured by the foregoing standard, it cannot be said that defendant was guilty of "willful" misconduct merely because it failed to house the gears, unless the housing of the gears was made a duty by some general or special order of the

Industrial Accident Commission, or by the act itself, and some one of the defendant's elective officers, with a willful disregard of the life, limb, or bodily safety of defendant's employees, having actual knowledge of the peril incident to the unhoused gears, or having what in law is equivalent to such actual knowledge, consciously failed to house the gears so as to avert injury.

Thus, then, we are brought to the question, Did the commission, by general or special order, direct the gears to be housed? Or, if it did not, what was defendant's statutory duty in that regard?

The act empowers the commission to make "general" safety orders, and "special" safety orders, after a hearing upon notice. (Secs. 57-59, Stats. 1913, pp. 307, 308.) A "general" safety order is defined as an order of the commission that applies generally throughout the state to all persons, employments, or places of employment; all other safety orders of the commission are declared to be "special" orders. (Subd. 6, sec. 51, Stats. 1913, p. 306.) The commission, without a hearing on notice, may summarily investigate any place of employment which it has reason to believe is not safe, and, after a hearing, upon such notice as it may prescribe, may enter such order as may be necessary. The order, so made and entered, must be served upon the employer. (Sec. 61, Stats. 1913, p. 308.)

[7] The evidence fails to show that any general order was ever made by the commission requiring gears, such as those that caused the injury to respondent, to be housed. Nor has our attention been called to any evidence in the record showing or tending to show that the commission ever made, entered, or served any special order requiring the gears to be encased. It is true, a safety engineer, representing the commission, went through the plant, in August, 1914, and made certain recommendations, and the same engineer, six months later, again visited the plant and checked up the things that had been done by defendant relative to a compliance with the recommendations he had made on his previous visit, with the result that he found defendant had done about one-half to two-thirds of the things that he had recommended in August, 1914. Such recommendations, however, cannot be deemed the equivalent of an order made and entered by the commission itself and served on the employer,

as contemplated by the act. It follows, therefore, that the evidence fails to show that the commission ever made or served any order requiring the gears to be housed or incased, or any other order with which defendant has neglected to comply.

In the absence of any such general or special order by the commission with respect to the gears, defendant's duty must be measured by the general requirements of the act itself.

The act requires every employer to furnish a place of employment which shall be "safe," and to furnish "such safety devices and safeguards, . . . as are *reasonably* adequate to render such . . . place of employment safe." (Sec. 52, Stats. 1913, p. 306.) It also is provided by the act that the terms "safety device" and "safeguard" shall "be given a broad interpretation so as to include any *practicable* method of mitigating or preventing a specific danger." (Subd. 9, sec. 51, Stats. 1913, p. 306.) The terms "safe" and "safety," as applied to any place of employment, are defined to mean "such freedom from danger to the life or safety of employees as the nature of the employment will *reasonably* permit." (Subd. 8, sec. 51, Stats. 1913, p. 306.)

[8] From these provisions and definitions it will be seen that, in the absence of any general or special order given and made by the commission in the mode and manner provided by the act, defendant's statutory duty, under the general requirements of the act itself, was to use such devices and safeguards as are "*reasonably* adequate" to render the place of employment safe, and to have its place of employment as free from danger to the life or safety of its employees "as the nature of the employment will *reasonably* permit."

[9] Tested by the foregoing, we are constrained to hold that certain of the court's instructions were erroneous and misleading. For example, the court instructed the jury as follows: "If you find from a preponderance of the evidence in this case that the plaintiff at the time of the injury was acting in the course of his employment, then, if such gears constituted a source of danger to the life or safety of the plaintiff, the defendant owed to the plaintiff the duty of providing and maintaining over the gears in question such safety devices or appliances as would tend to mitigate or prevent the danger to plaintiff from contact therewith." This in-

struction exacted of defendant a greater degree of care than is required by the act. Doubtless it is safe to say that the gears in question were a source of danger, just as all machinery, and, indeed, almost everything with which mankind is daily environed, is, in some degree, a potential source of danger. But the act does not require defendant to provide or maintain a place of employment that does not involve any element of danger whatever. All that is required is that the employer shall furnish a place of employment which is as free from danger to the life or safety of the employees "as the nature of the employment will *reasonably* permit." (Subd. 8, sec. 51.) Nor does the act require defendant to provide or maintain over the gears "such safety devices or appliances as would *tend* to mitigate or prevent the danger to plaintiff from contact therewith," irrespective of any other element or consideration. All that the act requires of defendant is that it provide and maintain over the gears such safety devices and appliances as are "*reasonably*" adequate to render the place of employment safe, and such as provide a "*practicable*" method of mitigating or preventing danger, and to do what is "*reasonably*" necessary to protect the life and safety of its employees. (Subd. 9, secs. 51, 52.)

After an examination of the entire cause, including the evidence, we cannot say that this misdirection of the jury did not result in a miscarriage of justice. Indeed, it is more than probable that the instructions, considered in their entirety, influenced the jury to defendant's prejudice. In the main, the instructions are too abstract. Considered as a whole, they were calculated to impress upon the minds of the jurors that, irrespective of reasonableness or practicability, it was defendant's bounden duty to incase the gears in housing, and that its mere failure to do so constituted gross negligence or willful misconduct.

Judgment reversed.

Sloane, J., and Thomas, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 1, 1919, and the following opinion then rendered thereon:

THE COURT.—In denying a hearing in this court we are not to be understood as intimating an opinion to the effect that there was sufficient evidence to support a conclusion of gross negligence or willful misconduct on the part of defendant, or on the question whether *every* failure to comply with a requirement of the Industrial Accident Commission or the statute is necessarily *gross* negligence or willful misconduct. On these questions we reserve expression of opinion.

The application for a hearing in this court after decision by the district court of appeal of the second appellate district, division two, is denied.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2923. Second Appellate District, Division Two.—October 3, 1919.]

NOAH WILLIAMS, Jr., Respondent, v. GEORGE H. REED,
Appellant.

- [1] **ACCOUNTING—NATURE OF INTERLOCUTORY JUDGMENT—APPEAL.**—In this action for an accounting after dissolution of a partnership the so-called “interlocutory judgment” entered was a final judgment from which, and each of the special orders following, an appeal was legally permissible.
- [2] **APPEAL—PRESUMPTIONS.**—An appellate court will never indulge in presumptions to defeat a judgment.
- [3] **JUDGMENTS—EFFECT OF DEFAULT—RELIEF PERMISSIBLE.**—A default admits the material allegations of the complaint, and no more; and the relief to be awarded to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issues.
- [4] **APPEAL—CONSIDERATION OF FACTS ASSERTED IN BRIEF.**—The appellate court cannot take notice of alleged facts which rest solely upon the mere assertion of counsel in their brief, even where such counsel has the confidence of the court.

- [5] **ID.—APPEAL ON JUDGMENT-ROLL—SUFFICIENCY OF EVIDENCE—PRESUMPTION.**—Where there is nothing legally before the appellate court that can be considered which will help in arriving at a conclusion as to whether or not the evidence offered was sufficient to support the judgment, that court is bound to presume that the evidence offered, whatever it was, was sufficient for such purpose.
- [6] **DEFAULT—MOTION TO OPEN—CONFLICTING AFFIDAVITS—ORDER—APPEAL.**—An order denying a motion to open a default and set aside an interlocutory judgment in an action for an accounting after dissolution of a partnership will not be disturbed on appeal where there is a sharp and decided conflict as to the questions presented by the affidavits of the respective parties.
- [7] **ID.—DISCRETION OF COURT—PRESUMPTION.**—A motion under section 473 of the Code of Civil Procedure to open a default and vacate an interlocutory judgment is addressed to the discretion of the court, and should be liberally exercised to promote justice and prevent fraud; and the presumption is that, in the absence of satisfactory showing to the contrary, the lower court so exercised its discretion.
- [8] **ID.—DISREGARD OF SUMMONS AND COMPLAINT SERVED—DENIAL OF RELIEF.**—Where the defendant was served with summons and complaint, but paid no attention thereto, the contention cannot successfully be maintained that his default was because of inadvertence, mistake, surprise, or excusable neglect.
- [9] **JUDGMENTS—FRAUD ON COURT—POWER TO SET ASIDE.**—A court has inherent power to set aside a judgment for fraud upon the court, and the right to so act or grant relief is not derived from section 473 of the Code of Civil Procedure. However, a fraud that will render such relief available does not include a judgment irregularly obtained upon a fraudulent claim or by false testimony. A judgment may be unjust, inequitable, and erroneous without being fraudulent or subject to be set aside by a court of equity.
- [10] **ID.—SALE OF PARTNERSHIP PROPERTY—DIRECTION AS TO GIVING OF NOTICE IMMATERIAL.**—In an action for an accounting after dissolution of a partnership, that portion of an interlocutory judgment directing the sheriff how and when to give the notice of sale of the partnership property is unnecessary and may be disregarded.
- [11] **ID.—INSUFFICIENCY OF NOTICE—VALIDITY OF SALE—REMEDY OF PARTY AGGRIEVED.**—Insufficiency of the notice of sale is not ground for setting aside an order confirming a sale made pursuant to a direction in a judgment or decree. The remedy of the party aggrieved under these circumstances is against the officer.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Affirmed.

The facts are stated in the opinion of the court.

Valentine & Newby, G. H. P. Shaw and John H. Foley
for Appellant.

Irwin, Smith & Rosecrans and Davis & Rush for
Respondent.

THOMAS, J.—This is an action for an accounting after dissolution of a partnership. Plaintiff's complaint herein was filed December 31, 1915, and, with the summons thereafter issued, was served on defendant on January 11, 1916. Default of defendant was entered on January 24, 1916. On March 15, 1916, an interlocutory judgment was entered. Appellant contends that the judgment was based upon a statement theretofore filed in said cause by respondent. This contention is opposed by respondent, who argues that, there being no findings of fact, and none of the evidence adduced upon the hearing of the matter being preserved in either a bill of exceptions or a statement of the case, only matters shown by the judgment-roll, consisting in this case only of the complaint and judgment, can be considered. On March 28, 1916, an amendment to said interlocutory judgment was made by the court, without any notice to appellant. Appellant appeals from this judgment and the amendment thereto. This will be referred to here as the *first appeal*.

On April 26, 1916, appellant duly served and filed his motion to open said default and set aside said interlocutory judgment, together with affidavits in support thereof, and his answer to the complaint. On April 28, 1916, and just prior to the hearing of said motion, respondent served on appellant counter-affidavits. On April 29, 1916, this motion was denied. From the order denying this motion appellant has appealed. This is the *second appeal*.

May 2, 1916, respondent served upon appellant a notice of motion to confirm the sale of the property of the partnership made by the sheriff. Objections to the confirmation of said sale were filed by appellant, and, after hearing evidence both for and against such confirmation, the court, on May 6, 1916, overruled said objections and entered an order confirming the sale. Appellant thereupon applied to the court to fix the amount of the bond to stay execution pending

appeal, under sections 943 and 945 of the Code of Civil Procedure. Said application was granted, the court fixing the bond at the sum of ten thousand dollars, and such appeal was then taken and the bond given according to law. We shall refer to this as the *third appeal*.

June 24, 1916, respondent served upon appellant's attorneys a notice of motion, supported by affidavits, to enter final judgment in said cause. Appellant did not appear at this hearing, and, on June 30, 1916, the court granted this motion and entered final judgment accordingly. This is the *fourth appeal* herein.

By proper stipulation the records in all four appeals have been, for the convenience of court and counsel, included in one transcript. The appeals will be considered in the order presented.

In reference to the *first appeal*, it may enlighten the matter some if it is understood that the complaint alleges that respondent had "paid into said copartnership business, both as capital and for the conduct and maintenance of said business, the sum of \$31,309.42, and has received from and on account of said copartnership the sum of \$6,554.83 in money," leaving a net investment, as we gather from the said allegation, of \$24,854.60. The statement of the account submitted to the court by respondent, and upon which the interlocutory judgment was rendered, shows the amount invested by respondent to be the sum of \$43,151.22, and the amount withdrawn the same as alleged in the complaint, to wit, \$6,554.83, leaving his net investment at \$36,596.39—or the sum of \$11,741.79 more in favor of respondent, apparently, than the allegations of the complaint authorize. Respondent contends that there is no warrant in the record for such conclusion, as already hereinbefore set forth.

[1] We are confronted at the outset with the query as to whether the interlocutory judgment, so called, entered herein is a "final judgment." If it is not, then no appeal from it is legally permissible, and the special orders, entered by the court subsequently to the entry thereof, and before the entry of the so-called judgment, are not appealable orders. Under the authority of *Zappettini v. Buckles*, 167 Cal. 27, [138 Pac. 696], we hold the judgment now under consideration to be a final judgment; that, consequently, an appeal lies therefrom, and, hence, that each of the special orders

following said judgment was also appealable. (Code Civ. Proc., sec. 963.)

The transcript discloses, as a part of appellant's bill of exceptions, the following: "That before interlocutory judgment was entered, the plaintiff filed a statement with the judge of said court, at his request, and represented that it was a correct statement of the copartnership account between plaintiff and defendant, which said statement was and is in words and figures as follows, to wit." Then follows a copy of the statement. An examination of the interlocutory judgment discloses the fact that it is in exact accord with the said "statement." How can one escape the conclusion, it is asked, that the judgment was based thereon?

It is urged by respondent that on an appeal from a default judgment only matters shown by the judgment-roll—consisting in this case only of the complaint and judgment—can be considered. If no other point were urged by appellant than the one now under consideration, it might be conceded that respondent's position would be invulnerable. (*Tomlinson v. Ayres*, 117 Cal. 568, [49 Pac. 717]; *Nevada Bank v. Dresbach*, 63 Cal. 324.) But other points are urged, and presently we shall see the force of appellant's position here. For our present purpose we call attention to the fact that, limited to the judgment-roll, we are confronted with the query: "Was the interlocutory judgment warranted under the allegations of the complaint?" If not, is it error apparent on the face of the judgment-roll? [2] It is true, as was said in *Ohleyer v. Bunce*, 65 Cal. 544, [4 Pac. 549], that an appellate court will never indulge in presumptions to defeat a judgment. What have we in this case, outside of an assumption based upon no evidence to which our attention has been called, to support appellant's claim that the judgment here was based upon the "statement" referred to? [3] "The relief to be awarded to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issues" (Code Civ. Proc., sec. 580), and "a default admits the material allegations of the complaint, and no more." (*Ellis v. Rademacher*, 125 Cal. 556, [58 Pac. 178]; *Balfour etc. Inv. Co. v. Sawday*, 133 Cal. 228, [65 Pac. 400].)

It is urged by appellant that the complaint contains no allegation which justifies the following—appearing as a portion of the interlocutory judgment: “That the sheriff of said county of Imperial, state of California, is hereby appointed to take possession of all said property belonging to said co-partnership,” etc. We think this was not in excess of the relief demanded. In other words, the language just quoted simply specifies one of the steps in a series to be taken by the said sheriff in carrying out the terms of the judgment and decree. It is true that in a “matter of purely special or exceptional recovery, the defendant is entitled to look solely to the prayer in determining whether he will defend against the relief sought in the action,” and that “if such special relief is not therein specifically demanded, it is to be deemed waived.” (*Brooks v. Forington*, 117 Cal. 219, [48 Pac. 1073].) But the present is, we think, not such a case.

The difficulty with which we are here confronted is not as just indicated, but is centered around the query as to whether on the consideration of this appeal from the interlocutory judgment we can take cognizance of the statement referred to. If we can do so legally, then the contention of appellant may be sustained. Concededly, so far as this first appeal is concerned, it is one on the judgment-roll alone. There are no findings. We have wholly failed to find anything “on the face of the record,” or contained within the judgment-roll, that justifies the assertion that the judgment was based on the said statement. [4] This court cannot take notice of alleged facts which rest solely upon the mere assertion of counsel in their brief, even although where, as in this case, such counsel has the confidence of the court. (*Horlton v. City of Los Angeles*, 119 Cal. 602, [51 Pac. 956]; *Dore v. Southern Pacific Co.*, 163 Cal. 182, [124 Pac. 817].) The record is entirely silent as to what evidence was introduced or considered at this hearing. This so-called “statement” is not authenticated in any bill of exceptions as such evidence. [5] This court, for the present, is mightily concerned, in passing upon the question, with what transpired at the trial; what evidence was there and then introduced, and what portion thereof the court accepted as true; but there is absolutely nothing legally before us that can be considered which will help in arriving at a conclusion as to whether or not the evidence offered was sufficient or insufficient to support the

judgment. This being true, we are bound to presume that the evidence offered, whatever it was, was sufficient for such purpose. The following cases, out of a multitude that might be cited, will, we think, support our conclusion: *Crane v. Brannan*, 3 Cal. 192; *Siebe v. Joshua etc. Machine Works*, 86 Cal. 390, [25 Pac. 14]; *Hyde v. Boyle*, 89 Cal. 590, [26 Pac. 1092]; *Johnston v. Callahan*, 146 Cal. 212, [79 Pac. 870]. It follows, therefore, that the said "statement" cannot be considered on this phase of the case, and that the so-called "interlocutory judgment" must be affirmed.

Now, as to the *second appeal*—the appeal from the order denying defendant's motion to set aside his default. At the outset we gather from defendant's bill of exceptions, as disclosed in the transcript, that in support of the motion were read plaintiff's complaint herein, the statement heretofore referred to as having been filed by plaintiff before the entry of the said interlocutory judgment, the affidavits of this defendant, John H. Foley, and H. C. Chase. In opposing said motion, plaintiff served upon defendant's attorneys, filed and introduced in evidence the affidavit of himself and one Noah Williams, traversing in detail every averment of plaintiff's said affidavits. [6] Thus, we see that a very sharp and decided conflict as to the questions presented was present. Under these conditions, we are powerless to interfere with the conclusion of the trial court herein. The rule is, as it has been so frequently stated, both by the supreme court as well as by this court, that "in the consideration of an appeal from an order made upon affidavits, etc., involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be taken as established." (*Doak v. Bruson*, 152 Cal. 17, [91 Pac. 1001]; *Hyde v. Boyle*, 105 Cal. 102, [38 Pac. 643]; *Bernou v. Bernou*, 15 Cal. App. 341, [114 Pac. 1000].) Under these circumstances, it is immaterial whether or not there was an affidavit of merits which complied with the legal requirements.

[7] Appellant urges that a motion under section 473 of the Code of Civil Procedure to open a default and vacate an interlocutory judgment is addressed to the discretion of the court, and should be liberally exercised to promote justice

and prevent fraud. In this we agree. And the presumption is that, in the absence of satisfactory showing to the contrary, the lower court so exercised its discretion. In this case our attention has not been called to anything which would show an abuse of discretion by the trial court, and since, as before stated, the deciding of the motion was a matter otherwise purely within the discretion of that court, we are now impotent to disturb the conclusion reached.

[8] In the present case, defendant was served with summons and complaint, but paid no attention thereto. Hence, the contention cannot successfully be maintained, it would seem, that under these circumstances his default was because of inadvertence, mistake, surprise, or excusable neglect. Section 473, *supra*, reads: "The court may . . . relieve a party . . . from a judgment . . . taken against him through his mistake, inadvertence, surprise, or excusable neglect." Obviously, it does not say that such relief may be granted because of the court's inadvertence, mistake, surprise, or excusable neglect. In the present case it seems to us that the error, if any, was "judicial error," which would be remedied only by appeal from the judgment. (*Byrne v. Hoag*, 116 Cal. 1, [47 Pac. 775]; *Grannis v. Superior Court*, 146 Cal. 245, [106 Am. St. Rep. 23, 79 Pac. 891]; *Johnston v. Callahan*, *supra*.) [9] It may be observed, in passing, that a court has inherent power to set aside a judgment for fraud upon the court, and the right to so act or grant relief is not derived from section 473, *supra*. (*Stierlen v. Stierlen*, 18 Cal. App. 609, [124 Pac. 226].) However, a fraud that will render such relief available does not include a judgment irregularly obtained upon a fraudulent claim or by false testimony. (*Parsons v. Weis*, 144 Cal. 410, [77 Pac. 1007].) Indeed, a judgment may be unjust, inequitable, and erroneous without being fraudulent or subject to be set aside by a court of equity. (*Davis v. Chalfant*, 81 Cal. 627, [22 Pac. 972].) By the order appealed from, the court, among other things, found "that there was no inadvertence of the court in entering judgment, adjudging that the plaintiff had contributed to the copartnership of Williams & Reed the sum of \$18,250.30 in excess of the amount contributed to said copartnership by the defendant. That there was no excusable neglect of the defendant in failing to answer said complaint. That there was no fraud of plaintiff in representing to the court that

he had contributed the sum of \$18,250.30 to the copartnership in excess of the amount contributed to said copartnership by the defendant."

For these reasons, therefore, it follows that the order denying defendant's motion to open the default and set aside the interlocutory judgment must be, and it is, affirmed.

This brings us to the consideration of the *third appeal*—the appeal from the order confirming the sale. Appellant urges five reasons for the reversal of this order, viz.: (1) Insufficiency of the notice of sale; (2) gross inadequacy of price; (3) the sale was without right of redemption; (4) because the shares of water stock were sold as personalty, separate and apart from the land, and the real estate was sold separate and apart from the water stock, which was appurtenant thereto; and (5) because the sale imposes upon appellant a gross injustice. These points were urged in the court below as objections to the confirmation of the sale.

Here again we are confronted with a condition almost exactly like the one we have just discussed in connection with the second appeal—that of the matter being presented by both sides on affidavits and other evidence. The evidence being in sharp conflict, and the court having decided that question, we are bound thereby, unless, of course, the evidence before us on its face discloses its insufficiency to support the court's conclusion therein. Appellant urges in his closing brief that, because all these appeals are in the same transcript and the record presents the entire transaction by means of which the respondent seeks to reap an unfair advantage, this court should consider all of the steps taken to accomplish this result, as the transcript presents it, rather than consider each appeal separately without any relation to the others; but our attention is not called to any rule of procedure, or to any law—and this court knows of none—which would authorize it to comply with this suggestion. It may be suggested here, too, that we have looked—and in vain—for something that would authorize us so to do. With the exception of the one question of the insufficiency of the evidence, just suggested in connection with the third appeal, our discussion of the points involved on the second appeal apply here.

[10] Of the five points urged for a reversal of the order appealed from, we are of the opinion that only one need be

considered, viz., the first—which relates to the insufficiency of the notice of sale given by the sheriff. Section 692 of the Code of Civil Procedure provides how notice of such sale should be given, while section 693 of the same code specifies the penalty which attaches to an officer selling without giving the notice as prescribed. In neither of these sections is there anything that requires the court, or any judge thereof, to direct the giving of the notice. For this reason we think that portion of the interlocutory judgment which directed the sheriff how and when to give the notice referred to unnecessary, and that it therefore may be treated as surplusage. The judgment is full, complete, and enforceable without such provision. Indeed, these two sections, taken together, “enjoin upon the sheriff both the duty and the responsibility of posting and publishing notices of sale as prescribed, which injunction necessarily implies the duty and the responsibility of selecting the place where notices are to be posted and the newspapers in which they are to be published, since they are not specified.” (*Northern C. I. Trust Co. v. Cadman*, 101 Cal. 200, [35 Pac. 557].) It would seem that “the penalty and responsibility of the sheriff are inconsistent with the right or authority of anyone else to dictate places or papers in which notices are to be published, and consistent only with his duty and power to select the place and newspaper in which to publish required notices.” (*Northern C. I. Trust Co. v. Cadman*, *supra*.) “Questions appertaining to the notice, as well as all others which merely relate to irregularities, are between the officer selling and the parties to the execution.” (*Kelley v. Desmond*, 63 Cal. 517.) Therefore, the portion directing the manner of posting and the places where the notice of sale was to be posted and published may be disregarded. “Neglect of officer making the sale to give notice required by law does not affect the validity of the sale, but the party aggrieved has his remedy against the officer for any injury sustained by reason of such neglect.” (*Smith v. Randall*, 6 Cal. 47, [65 Am. Dec. 475]; *Harvey v. Fisk*, 9 Cal. 94.)

[11] It would seem useless to discuss this phase of the question further, for under both of the sections mentioned, as we construe them, and the cases decided by our own supreme court, as we understand them, it has been repeatedly held that such a sale as the one under discussion was a valid

sale, even when the statute had not been complied with in any way—no notice of any kind having been given. Under these circumstances it becomes apparent that this court is without power or jurisdiction to set aside the order confirming the sale for this or any of the reasons urged as aforesaid.

It follows that the order of the trial court overruling the objections of defendant and confirming the sale must be, and it is, affirmed.

From all that has been said hereinbefore, we think it follows that the *fourth appeal*—the appeal from the final judgment—is not well taken, and that for each of the reasons advanced—while assuming, without so holding, that the judgment in this case is “unjust, inequitable, erroneous, or irregularly obtained by false testimony”—under the law, as we have shown above, we are powerless, in the face of the record before us, to do anything but affirm the judgment. The remedy under these circumstances is against the officer, unless, indeed, the defendant has slept upon his rights.

The judgment is affirmed.

Finlayson, P. J., and Sloane, J., concurred.

[Civ. No. 2368. Second Appellate District, Division One.—October 3, 1919.]

CHARLES W. CHASE, Respondent, v. WILLIAM OEHLKE et al., Defendants; F. D. GRIFFITH et al., Appellants.

- [1] LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEES.—Where tenants hold under a mere naked assignment of the lease, their liability is, as to the landlord, limited to their occupancy of the premises and terminates with their abandonment of possession.
- [2] ID.—EXPRESS COVENANT TO PAY RENT—OBLIGATIONS OF ASSIGNEES. Where, however, the assignees by express terms in writing covenant and agree to pay the rent reserved in the lease, it presents two sets of obligations and rights: one comprising those due to the

1. Assignment of lease, notes, 10 Am. St. Rep. 557; 15 L. B. A. 754.

relation of landlord and tenant based upon privity of estate, and the other due to privity of contract by the terms of which the obligation of assignees of the lease is to be measured.

[3] **ID.—REPUDIATION OF LEASE BY ASSIGNEES—RIGHT OF LESSOR TO SUE—PARTIES.**—Where the assignees of a lease have upon sufficient consideration assumed and agreed to pay the rent, their obligation is identical with that of the original lessee upon his express covenant so to do, and when they repudiate the lease and abandon the premises, the lessor is entitled to stand upon the terms of the contract made with the lessee and his assigns for the lessor's benefit and sue thereon to recover the rent which they agreed to pay, in the same manner and to the same extent as though they had been the original obligors under the terms of the lease, regardless of whether or not the lessor was a party to the assignment contract.

[4] **ID.—ABANDONMENT OF PREMISES BY TENANT—RELEASE FROM FURTHER LIABILITY.**—The rule that where a tenant abandons leased property and repudiates the lease, if the landlord takes unqualified possession thereof, the tenant, upon the theory of a rescission, is released from further liability, is not applicable where the tenant repudiates the lease and abandons the demised premises and the landlord, without taking unqualified possession of the premises, endeavors, without success, to obtain a new tenant.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. A. Miller for Appellants.

Charles W. Chase, *in pro. per.*, for Respondent.

SHAW, J.—This action to recover rent under the terms of a written lease and covenants of the assignments thereof arose out of the following facts: On February 1, 1913, plaintiff executed to one William Oehlke a lease to certain premises for the terms of two years at a specified rental. Oehlke assigned the lease to J. F. Petell, by whom it was assigned to F. D. Griffith, who in turn assigned the same to defendant Ella Swickard, and in each case the assignee agreed in writing to carry out and fulfill the terms of the lease in the place

4. Remedy of landlord upon abandonment of premises by tenant, note, 13 L. E. A. (N. S.) 898.

and stead of his assignor, all of which facts were set forth in the complaint, which also alleged that the rent reserved in said lease was fully paid up to and including the month of March, 1914, at which time defendant Swickard, as the last assignee of the lease, was in possession of the premises, and "that about the latter part of the month of March, A. D. 1914, the defendant Swickard abandoned and left said demised premises and removed therefrom and repudiated said lease and refused then and always thereafter to be bound by the same, and refused to be bound by any of the terms thereof, all of which was without the consent and against the wishes of the plaintiff," who did not at any time terminate said lease nor exercise any right or option to terminate the same, which allegations, since not denied, must be deemed, as found by the court, to be true.

The appeal is by defendants Griffith and Swickard, against whom judgment was rendered for the balance of the rent due from March 31st to the end of the term specified in the lease.

[1] Appellants' first contention is that, as assignees of the lease, their liability as tenants of the property was, as to the landlord, limited to their occupancy of the same and terminated with their abandonment of possession. This is true where the tenant holds under a mere naked assignment of the lease, since the sole basis of his obligation is what is termed the privity of estate (Civ. Code, sec. 822; *Samuels v. Ottinger*, 169 Cal. 209, [Ann. Cas. 1916E, 830, 146 Pac. 638]; *Carter v. Hammett*, 18 Barb. (N. Y.) 608; *Bonetti v. Treat*, 91 Cal. 226, [14 L. R. A. 151, 27 Pac. 612]), under which the liability grows out of the relation of landlord and tenant.

[2] Where, however, as in the instant case, the assignees by express terms in writing covenant and agree to pay the rent reserved in the lease, it presents two sets of obligations and rights: one comprising those due to the relation of landlord and tenant based upon privity of estate, and the other due to privity of contract by the terms of which the obligation of assignees of the lease is to be measured. (*Samuels v. Ottinger*, *supra*; *Brosnan v. Kramer*, 135 Cal. 39, [66 Pac. 979]; *Tiffany on Landlord and Tenant*, sec. 181; 18 Am. & Eng. Ency. of Law, 675.) [3] As stated, the action is based upon the covenants made by the appellants—the consideration therefor being the transfer of the lease—to pay the rent

reserved therein. The contract was for the benefit of the lessor and, regardless of whether or not he was a party to the transfer, he was entitled to maintain an action thereon. (Tiffany on Landlord and Tenant, sec. 158; Civ. Code, sec. 1559.) Appellants having upon sufficient consideration assumed and agreed to pay the rent, their obligation is identical with that of the original lessee upon his express covenants so to do, and when they, as alleged and found, repudiated the lease and abandoned the premises, the plaintiff was entitled to stand upon the terms of the contract made with the lessee and his assigns for the lessor's benefit and sue thereon to recover the rent which they had agreed to pay, in the same manner and to the same extent as though they had been the original obligors under the terms of the lease. The error of appellants' counsel is due to the fact that he assumes the action to be based upon the relation of landlord and tenant, rather than upon express covenants.

[4] It is next contended that where a tenant abandons leased property and repudiates the lease, if the landlord takes unqualified possession thereof, the tenant, upon the theory of a rescission, is released from further liability, in support of which may be cited *Baker v. Eilers Music Co.*, 26 Cal. App. 371, [146 Pac. 1056], and *Rehkopf v. Wirz*, 31 Cal. App. 695, [161 Pac. 285]. The principle announced in those cases, however, is not applicable to the facts in the case at bar, for while, as heretofore stated, plaintiff alleged a repudiation of the lease and abandonment of the demised premises, for which, without success, he tried to obtain a tenant, it is neither alleged in the answer nor found by the court that plaintiff, as in the cases cited, took unqualified possession or any possession of the premises so leased. No such issue was involved in the case. There is no merit in the claim that under the terms of the lease the tenant was given the option to cancel and terminate the lease by an actual surrender of possession and payment of rents due or to become due from the subletting of a part of the property.

As appears from the record, the appellants, in consideration of an assignment of the lease, covenanted and agreed to pay the rent accruing thereunder from the date of such assignment, which covenant they repudiated by refusing to pay the rent, and abandoned the leased premises. Whereupon plaintiff, without any allegation or finding that he took pos-

session of the premises, or rented them to another, brought suit upon the contract to recover the rent, for which judgment was properly rendered against appellants.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 477. Third Appellate District.—October 4, 1919.]

THE PEOPLE, Respondent, v. T. K. SCOTT, Appellant.

[1] **CRIMINAL LAW—ROBBERY—INSTRUCTIONS—EVIDENCE—PREJUDICIAL ERROR.**—In this prosecution for the crime of robbery, the law pertinent to the case, as made by the evidence, was correctly stated to the jury, the court's rulings on the evidence were fairly correct, no prejudicial error in that respect being shown by the record, the defendant was given a perfectly fair trial according to law, and the evidence produced at the trial, having been accepted by the jury, was amply sufficient to justify the verdict.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Emmett Phillips, Jr., and Donald McKisick for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was convicted, under an information duly filed in the superior court of Sacramento County, of the crime of robbery, and has brought the cause to this court on an appeal from the judgment and the order denying him a new trial.

No brief was filed in behalf of the defendant in support of his appeal, nor was there any appearance for him and in his behalf when the cause was regularly called at the late term of this court for argument, the case having previously been regularly placed on the calendar of the court at said term for hearing and the attorney of record of the de-

fendant duly apprised by the clerk of this court of that fact. Accordingly, the attorney-general submitted the case for decision on the record.

[1] The people produced evidence at the trial amply sufficient to justify the verdict, such testimony having been accepted by the jury.

The robbery was committed in the early hours of the morning of March 11, 1919, in the city of Sacramento, and one Charles E. Sundahl, an elderly man, was the party robbed. It appears that Sundahl had been at the Southern Pacific passenger depot in the city of Sacramento with some acquaintances, who were waiting at the depot for and finally took a belated train for some point. Sundahl and his friends had, during the hours preceding the time when the latter took the train, indulged more or less in intoxicating liquors, and when, after leaving the depot, Sundahl had arrived at the corner of Fourth and K Streets, in said city, on his way home, at about the hour of 2 o'clock A. M., he was in some degree under the influence of intoxicants. At Fourth and K Streets he applied to a taxi driver to convey him home, but the driver asked seventy-five cents for the service, and Sundahl refused to pay that sum, and thereupon started in the direction of L Street, walking on the west side of Fourth Street. The defendant started away with Sundahl, taking the latter by the arm and walking with him toward L Street, and when they reached the alley between K and L Streets, Scott forcibly took Sundahl down the alley a few feet, struck him, knocking him to the ground, and then went through his pockets and abstracted therefrom and took with him several dollars in silver. This latter proceeding was witnessed by a Japanese night watchman, who arrested Scott and delivered him over to the custody of two police officers.

We have examined the charge of the court and the record generally, and from such examination are justified in saying that the law pertinent to the case, as made by the evidence, was correctly stated to the jury and was fair to both sides, and that the court's rulings on the evidence were generally correct. No prejudicial error in that respect was discovered by our examination of the record. Indeed, we think the defendant was accorded a perfectly fair trial according to law, and we may add the suggestion that the fact that the defendant's counsel did not press the appeal may be taken as evidence

that they, too, came to the conclusion, after an examination of the record subsequently to the trial, and after it was made up, that the convicted man has no just legal ground for complaint against the manner in which the court below conducted the trial.

The judgment and the order are *affirmed*.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 2371. Second Appellate District, Division One.—October 4, 1919.]

M. KRANTHOR, Appellant, v. **AL. G. FAULKNER COMPANY** (a Corporation), Respondent.

[1] **LIENS—MORTGAGE LIEN—POSSESSORY LIEN FOR REPAIRS—SUPERIORITY.**—The possessory lien of one who repairs personal property, at the request of the owner or legal possessor thereof, is superior to the lien and right of possession of the owner of a pre-existing chattel mortgage.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Frederick A. Preston for Appellant.

Howard E. Reach and Frederick H. Griffith for Respondent.

CONREY, P. J.—The facts bring this case directly within the rule stated in *Mortgage Securities Co. of California v. Pfaffmann*, 177 Cal. 109, [L. R. A. 1918D, 118, 169 Pac. 1033]. It was there held that the possessory lien of one who repairs personal property, at the request of the owner or legal possessor thereof, is superior to the lien and right of possession of the owner of a pre-existing chattel mortgage. On the authority of that decision the judgment in this action is affirmed.

Shaw, J., and James, J., concurred.

[Civ. No. 2160. Second Appellate District, Division Two.—October 4, 1919.]

E. F. SWARTZ, Respondent, v. E. BURR et al., Appellants.

- [1] **CORPORATIONS—CONTRACT MADE BY OFFICIAL—ADMISSIBILITY OF PAROL EVIDENCE TO HOLD CORPORATION.**—Parol evidence may be invoked to hold a corporation upon a contract entered into by its president or manager in his own name, if it was intended for and inured to the benefit of the corporation and there is anything on the face of the instrument suggesting that it was made for an undisclosed principal.
- [2] **ID.—ONE MAN CORPORATIONS—MANNER OF EXECUTING CONTRACTS IMMATERIAL.**—The law is not scrupulously particular in discriminating between the contracts of one who owns practically all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity.
- [3] **ID.—EXECUTION OF CONTRACT BY CORPORATE OFFICIAL—EFFECT ON CORPORATION—KNOWLEDGE OF FACTS—ACTION TO ENFORCE—EVIDENCE—INFERENCE.**—In this action against a corporation and its president and general manager to recover a given sum of money and to cancel a certain promissory note, in pursuance of the terms of a written agreement entered into between the plaintiff and such president and general manager, it may reasonably be inferred from the evidence that both parties entered into the contract on the understanding that such president and general manager was the voice of the corporation and that whatever he agreed to would bind the corporation; and it may also be found, as a legal inference from the relations of such president and general manager to the corporation, as shown by the evidence, that the latter is presumed to know of the execution of the contract, and its terms, and that it was the recipient of the consideration.
- [4] **ID.—EXECUTORY CONTRACT—SALE UPON CONDITION PRECEDENT—RIGHT OF ELECTION BY PLAINTIFF—LIABILITY OF CORPORATION.**—Where the contract between the plaintiff and such president and general manager with reference to the sale of stock in the defendant corporation was executory, its consummation dependent on the condition precedent that at the expiration of one year plaintiff elect to retain the stock, the corporation, which received the money and the note given in payment with knowledge of the contract, held them subject to the exercise of plaintiff's option, and was bound to repay the money and surrender the note for cancellation upon the plaintiff's decision not to retain the stock. It could not accept the benefits and repudiate the obligations.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. G. Tyrrell, A. L. Abrahams and Chas. W. Fricke for Appellants.

John E. Daly and James H. Daly for Respondent.

SLOANE, J.—The plaintiff brought this action to recover three thousand dollars, and cancel a promissory note for two thousand dollars, in pursuance of the terms of an agreement in writing as follows:

“Los Angeles, Cal., Oct. 8th, 1913.

“This agreement entered into this 8th day of October, 1913, by and between E. F. Swartz, party of the first part of Fresno, Cal., and E. Burr, party of the second part of Los Angeles, California. Witnesseth, that in consideration of the first party paying second party the sum of three thousand (\$3,000.00), receipt of which is hereby acknowledged and note for two thousand dollars (\$2,000.00), due on or before 15 months from date hereof, second party agrees and does hereby deliver to first party fifty shares of the capital stock of the Burr Creamery Co. to be held for a period of one year by first party. If at the expiration of that time first party desires to sell said stock he agrees to sell only to second party who agrees to pay first party for same the sum of \$5,000.00 with interest at 8% per annum. In the event first party is satisfied to remain a stockholder after a period of one year then he will participate in any and all dividends, improvements and increased assets of the corporation, share and share alike with other stockholders.

“E. F. SWARTZ.

“E. BURR.”

It is alleged in the complaint, and the court on the trial found, that, although this agreement was executed in the name of the defendant E. Burr, and ostensibly as his personal obligation, it was made for and as the contract of the defendant Burr Creamery Company, a corporation, of which E. Burr was the president and general manager. Judgment was against the corporation.

[1] It has become a well-settled rule of evidence, under the decisions in this state, at least, that parol evidence may be invoked to hold a corporation upon a contract entered into by its president or manager in his own name, if it was intended for, and inured to the benefit of, the corporation, and there is anything on the face of the instrument suggesting that it was made for an undisclosed principal. (*West v. Prather & Co.*, 7 Cal. App. 81, [93 Pac. 892]; *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, [41 Pac. 1017, 45 Pac. 272]; *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, [50 Pac. 650]; *Escondido Oil etc. Co. v. Glaser*, 144 Cal. 494, [77 Pac. 1040]; *Pacific Improvement Co. v. Jones*, 164 Cal. 260, [128 Pac. 404].) In *Southern Pac. Co. v. Von Schmidt Dredge Co.*, *supra*, the court says: "Thus the rule is well settled that where the reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent." The opinion further adopts with approval the following quotation, italicized as here shown, from Abbott's Trial Evidence: "If upon the face of the instrument there are indications suggestive of agency, such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper, parol evidence is competent to show whom the parties intended should be bound or benefited. And even where the contract *bears no such suggestion* on its face, the rule as now generally received is, that parol evidence is competent, either in favor of or against the corporation." The same citation from Abbott's Trial Evidence is approved in *Bean v. Pioneer Mining Co.*, 66 Cal. 451, [56 Am. Rep. 106, 6 Pac. 86].

The reference in the foregoing contract to the Burr Creamery Company as a possible party in interest is obscure at best. But it does appear that the stock involved is that of the Burr Creamery Company, that the delivery of the stock is something less than an executed transfer, and is to be held only for a year at the option of the purchaser, and that the right to participate in the dividends, improvements, and assets of the corporation, by virtue of said stock, is to be postponed until the purchaser has made his election to retain it. At

any rate, the trial court did admit parol evidence to explain the contents and execution of this instrument, to which no exception seems to have been taken; and the main question appears to be whether the evidence is sufficient to sustain the findings of the court that "E. Burr did not in any of the matters upon which this action is based act in an individual capacity, nor otherwise, except for and on behalf of the defendant corporation," and "that said agreement was authorized and ratified by said corporation, and it received and accepted and used for its corporate purpose all the benefits of said agreement." That the transaction was wholly for the benefit of the corporation is not disputed. The stock bargained for was the unissued stock of the company. The three thousand dollar payment was to the order of the corporation, and was used for its benefit, and the note for two thousand dollars was executed to the corporation, as payee, and the reservation of dividends and profits during the year in which the option was to be exercised inured to the corporation.

That the plaintiff did not enter into this agreement with Burr in his individual capacity is not so clear. Nominally the transaction was with Burr personally. The only theory on which it can be held that the minds of the parties met on an obligation intended to bind the corporation is that Burr considered himself, in the negotiations, and was considered by plaintiff, as being the personification of the corporation. If the evidence had disclosed that this was a "one man corporation," and that Burr was the only person beneficially interested in it to any material extent, there would be no difficulty in maintaining this theory. [2] The law is not scrupulously particular in discriminating between the contracts of one who practically owns all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity. While such is not the situation here, so far as shown by the evidence, it does fairly appear that the defendant, E. Burr, not only was the president and manager of this company, but that he ran its affairs largely in his own discretion. The vice-president of the company, who was a party to the negotiation of this agreement, represented to plaintiff that "Burr is the corporation." The fact that his name identifies the corporation, and that he is

the only member or officer of the corporation connected, so far as the record discloses, with the defense of this action, tends to confirm such a conclusion.

[3] It may reasonably be inferred from the evidence that both Burr and the plaintiff entered into this contract on the understanding that Burr's voice was the voice of the corporation, and that whatever he agreed to would bind the corporation. It may also be found, as a legal inference from Burr's relation to this company, that the corporation is presumed to know of the execution of this contract, and its terms, and that it was the recipient of the consideration. (*Goodwin v. Central Broadway Bldg. Co.*, 21 Cal. App. 876, [131 Pac. 896]; *Balfour v. Fresno Canal Co.*, 123 Cal. 397, [55 Pac. 1062]; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 597, [77 Pac. 1113]; *Anderson v. Kinley*, 90 Iowa, 554, [58 N. W. 909].)

This brings us to a consideration of the question as to whether there is anything in the terms of the agreement to put the corporation on inquiry as to its liability thereon, or to estop it from repudiating the agreement and retaining the consideration. The corporation had notice that this was a contract for the transfer of a block of its unissued capital stock; that it had received the three thousand dollars cash payment, and that the note was made payable to it, in its corporate name; that while E. Burr is named as the "second party" to this agreement, and signs it in his individual name, the contract recites that this three thousand dollars which was paid the corporation was paid to the "second party" to the contract, and that the note which names the corporation as the payee was executed to the "second party." The corporation further knew that Burr was its president and manager, and had been intrusted by it with a large measure of discretionary control of its affairs.

Furthermore, it is indicated on the face of this contract that the sale of stock is in a sense not a completed, but an executory or conditional sale. It recites that "said second party does hereby deliver to first party fifty shares of the capital stock of the Burr Creamery Co. to be held for a period of one year by first party," with the condition that the second party may terminate the purchase at his option and receive his money back. And there is the further implied agreement that the corporation may retain all dividends and

profits of the shares of stock until the election of the party of the first part to retain the stock. All of these conditions tend to identify the corporation as the party in interest designated as the "second party." If this appeared on the face of the agreement to be a completely executed sale of the shares of stock, and the consideration paid, with the only condition a condition subsequent—that if after a year the purchaser was dissatisfied E. Burr would repurchase the shares from him—doubtless the only remedy of the plaintiff would be on such new and independent contract to repurchase. [4] But if the agreement for the sale of the stock to plaintiff can be considered executory, and its consummation dependent on the condition precedent that at the expiration of one year plaintiff elects to retain it, then the corporation which has received the money and the note, with knowledge of the contract, holds them subject to the exercise of plaintiff's option, and must repay the money, and cannot collect the note, but must surrender it for cancellation in the event plaintiff decides not to retain the stock. It cannot accept the benefits and repudiate the obligations. (*Pauly v. Pauly*, 107 Cal. 8, [48 Am. St. Rep. 98, 40 Pac. 29].) Such seems to have been the view taken by the trial court under the evidence. We will not disturb its findings. The contract not being an executed contract of sale, but merely one whereby plaintiff, in effect, was given the optional right either to purchase at the end of the year or to receive back that which the corporation had received from him through Burr, the case is in no wise analogous to those cases wherein the purchaser and owner of stock seeks to enforce a contract of resale by attempting to compel "B" to purchase the stock under a contract that was made with and in the name of "A."

The judgment is affirmed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 1990. Third Appellate Distret.—October 4, 1919.]

THOMAS J. EHRHART et al., Respondents, v. D. R. MAHONY et al., Appellants.

- [1] **SPECIFIC PERFORMANCE—PLEADING AND PROOF—REQUISITES FOR RELIEF.**—In an action for the specific performance of a contract, the plaintiff must plead and prove that the party against whom that remedy is invoked received an adequate consideration for the contract and that, as to him, the contract is just and reasonable.
- [2] **ID.—SUFFICIENCY OF COMPLAINT.**—In an action by the vendors for the specific performance of a written contract for the purchase by defendants of certain mining property, allegations that the price at which the defendants agreed to purchase the property in question "is fair and reasonable and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and equitable and was fairly entered into between the plaintiffs and defendants," while they in a measure involve conclusions of the pleader and of law, they also involve a statement of the fact and are sufficient to resist the effect of a general demurrer.
- [3] **ID.—ISSUES PRESENTED—EVIDENCE—APPEAL—PRESUMPTION.**—Where the answer of the defendants specifically denied these allegations and thus tendered an issue upon the question of the fairness and reasonableness of the consideration, but the appeal is not supported by a transcript of the testimony or a bill of exceptions, the appellate court may presume, in support of the judgment in favor of the plaintiffs, that the action was tried upon the theory that the allegations were sufficient and that testimony was received without objection in support thereof.
- [4] **ID.—TENDER OF CONVEYANCE—WHEN EXCUSED.**—In such an action, technical defects in the tender, or even a want of any tender, is immaterial, when the answer shows that a conveyance would have been refused in any event.

APPEAL from a judgment of the Superior Court of Calaveras County. N. D. Arnot, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. A. Dower for Appellants.

Snyder & Snyder and Nutter, Hancock & Rutherford for Respondents.

HART, J.—On September 27, 1910, the parties to the action entered into a written agreement denominated "Contract for Deed," whereby the plaintiffs agreed to sell and the defendants agreed to purchase three certain quartz mining claims in Calaveras County for the sum of three thousand dollars, payable in installments, and defendants agreed to do all assessment work on said claims from the date of said contract. Defendants paid the first installment of fifty dollars, but made no further payments, and they notified plaintiffs that they refused to carry out said contract or to pay any further installments. On the 19th of December, 1910, plaintiffs executed a deed of said mining property conveying the same to defendants and offered to deliver the same to defendants upon the payment of the balance of the purchase price, which defendants refused to do. This action was brought to recover the balance of the purchase price, \$2,950, and the sum of three hundred dollars, which plaintiffs alleged they had expended for assessment work upon the claims. Judgment was in favor of plaintiffs for the amount sued for and this appeal is prosecuted by defendants from said judgment upon the judgment-roll alone.

The action was before the supreme court upon an appeal from a former judgment for the same amount. (*Ehrhart v. Mahony et al.*, 170 Cal. 148, [148 Pac. 934].) That court held, upon the authority of *White v. Sage*, 149 Cal. 613, [87 Pac 193], and *Sparks v. Hess*, 15 Cal. 186, that the action here is in effect one for the specific performance of a contract, and reversed the judgment for the reason that "the complaint does not allege, nor does the court find, facts showing that there was an adequate consideration for the obligation sought to be enforced, or that the contract was just or reasonable as to the defendants." Upon the case being returned to the superior court of Calaveras County the complaint was amended as follows: "That said defendants have received an adequate consideration for said contract; that the price for which the defendants so agreed to purchase said property and the plaintiffs so agreed to sell the same is a fair and reasonable price for said property and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and equitable and was fairly entered into between the plaintiffs and defendants," and a finding was made accordingly. To the amended com-

plaint the defendants submitted a general demurrer, which was overruled, whereupon they filed an answer thereto.

Two points are made by appellants for a reversal of the present judgment: First: That the complaint fails to disclose that the contract, as to the defendants, is just and reasonable, and that they have received an adequate consideration for the contract. (Civ. Code, sec. 3391.) Second: That the findings do not support the theory that "defendants served notice that they refused to perform their part of the contract prior to the time that respondents made tender and demand."

[1] Section 3391 of the Civil Code declares that specific performance cannot be enforced as to the party against whom that remedy is invoked "if he has not received an adequate consideration for the contract," or "if it is not, as to him, just and reasonable."

The above requisites in an action for relief by way of specific performance, as all the authorities say, must be pleaded and proved to justify the awarding of such relief.

[2] The amended complaint in this action, as we have seen, alleges that the price at which the defendants agreed to purchase the property in question "is fair and reasonable and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair and equitable," etc. While these allegations in a measure involve conclusions of the pleader and of law, they also involve a statement of the fact. At any rate, they are sufficient to resist the effect of a general demurrer. [3] The amended answer specifically denies these allegations and thus tendered an issue upon the question of the fairness and reasonableness of the consideration; and the appeal not being supported by a transcript of the testimony or a bill of exceptions, we may presume, in support of the judgment, that the action was tried upon the theory that the allegations were sufficient and that testimony was received without objection in support thereof.

[4] The remaining point of those urged for a reversal involves an attack upon the findings that the defendants notified the plaintiffs of their refusal to perform their part of the contract, and that plaintiffs made a tender of a conveyance to defendants and demanded of them the performance of the contract.

The complaint, the answer, and the findings upon the question of tender and the refusal of the defendants to stand up to the contract are precisely the same here as they were in the record on the former appeal, which, like the appeal here, was from the judgment on the judgment-roll alone. The question of tender was presented to the supreme court on the former appeal and, in the opinion in that case (*Ehrhart et al. v. Mahony et al.*, 170 Cal. 148, [148 Pac. 934]), was disposed of as follows: "The appellants criticise the allegation of tender, but since their answer showed that a conveyance would have been refused in any event, technical defects in the tender, or even a want of any tender, would be of no importance. (Civ. Code, sec. 1440.)"

The facts presented on both appeals upon the point now under review being the same, the above is the law of the case as to said point and is decisive thereof against the position of the appellants.

No other points are presented.

The judgment is affirmed.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

[Crim. No. 485. Third Appellate District.—October 6, 1919.]

THE PEOPLE, Respondent, v. MAY GILMAN, Appellant.

[1] CRIMINAL LAW—ABORTION—VERDICT—EVIDENCE—CORROBORATION.—

In this prosecution for abortion the verdict was amply supported by the evidence, and the testimony of the prosecutrix was fully corroborated as required by section 1108 of the Penal Code.

[2] ID.—EVIDENCE—OBJECTIONS—TIME.—An objection to a question after it is answered comes too late.

[3] ID.—ADMISSIBILITY OF SURGICAL INSTRUMENTS.—In a prosecution for abortion it is not error to admit in evidence surgical instruments of a nature to be used in the commission of such an offense where not only is there circumstantial evidence that the defendant used the instruments, but it is admitted by her without objection that she owned them and had them in her possession at the time the alleged offense was committed.

3. Admissibility against defendant of articles taken from him, notes, 59 L. R. A. 467; 8 L. R. A. (N. S.) 762; 34 L. R. A. (N. S.) 58; L. R. A. 1915B, 834; L. R. A. 1916E, 715.

APPEAL from a judgment of the Superior Court of Sacramento County. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. E. Davies for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—Defendant was convicted of abortion and from the judgment and order denying her motion for a new trial the appeal has been taken. Some claim has been made that the evidence is insufficient to support the verdict, and the appellant indulges in a criticism of the testimony of certain witnesses of the prosecution, claiming that in certain respects it is inconsistent and unsatisfactory. [1] After a careful reading of the record, however, it must be stated that the verdict is supported in ample measure. The prosecutrix seems to have related a straightforward story that carries upon its face convincing evidence of her veracity. She manifested no unwonted hostility to the defendant, but was apparently disposed to relate all the facts of the case within her knowledge just as they transpired. It is true that her evidence alone, within the purview of the statute (Pen. Code, sec. 1108), must be corroborated in order to justify legally a conviction. That corroboration is, however, found in full measure in the record before us. We deem it unnecessary and unprofitable to set out in detail the evidence which justifies the conviction. It is sufficient to say that one Mrs. Johnson was present at the place where the offense was committed at the very time of the delivery of the foetus, and her testimony is strong and convincing as to the criminal conduct of defendant. She also related a conversation which she had with defendant which was indicative and persuasive of defendant's guilt. It may be added that the record contains substantial, significant, and important circumstantial evidence, all tending toward the support of the verdict of the jury. Indeed, it is rare that a case of this character is established by such a strong array of positive and circumstantial evidence. It would be singular and unexpected if

the jury had failed to convict after a careful and conscientious consideration of the showing that was made in this case.

Viewing the whole record in the light of the strong and conclusive evidence of guilt, it could fairly be said that none of the assignments of error could have resulted in a miscarriage of justice, and, hence, we would be justified in brushing them aside as not warranting specific consideration. We have, however, examined them with some degree of care and are prepared to say that no substantial error was committed by the trial court. The defendant seems to have been granted every right to which she was entitled under the law. The trial judge conducted the proceedings cautiously, impartially, and justly. The instructions thoroughly and correctly presented the law of the case and left nothing unsaid that was necessary for the guidance of the jury in their determination of the guilt or innocence of the defendant. It is true that certain instructions, proposed by her, were refused, but as far as correct in doctrine and applicable to the facts of the case, they were entirely covered by instructions which were given.

As to the rulings upon the admissibility of evidence they are so palpably and clearly sound that we are hardly called upon to specifically notice them. However, we may refer to one or two of these assignments of error. Objection was made, for instance, to this question addressed to Mrs. Johnson: "Q. Was there anything said subsequent to, after what you saw, between you and the nurse, this defendant, Gilman, as to what you saw and what transpired?" The answer of the witness was: "I spoke afterward, that I thought Mrs. England was quite lucky to be living." [2] In the first place, no objection was made to the question until after it was answered, and, hence, the objection came too late. Again, under a familiar rule it was admissible as a part of the conversation, in view of the response made by said defendant to said statement. That answer was: "She said her work always spoke for itself." As a part of the same conversation, it may be added, the witness testified: "I asked her what she might do about it, about the baby, and she says, 'I told Mrs. England that I would take it to the coroner, but that would cause me too much questioning,' and she further said, 'I will build a good fire.'" It may be added that the only objection to this part of the conversation was upon the ground that it was leading, which, of course, is inconsequential.

Another ruling of which complaint is made was in sustaining an objection to the following question, asked of the prosecutrix on her cross-examination: "Q. Now, did she at any time when you were leaving, tell you she [the defendant] would help you to obtain employment elsewhere?" This manifestly called for a "self-serving" declaration on the part of defendant and was clearly inadmissible. Besides, it was clearly a matter of no importance in the consideration of the merits of the case. It may be suggested that a similar ruling was made by the court in reference to questions propounded to the defendant by her counsel as to her physical condition and medical treatment, that she was receiving, at the time of the trial. It is clear enough that such matters had no bearing whatever upon the charge against the defendant. If there had been any attempt to show or suggestion that her physical condition, at the time of the commission of the alleged offense, was such as to make it impossible or even difficult for her to have committed it, then, of course, a different question might be presented. We may also refer briefly to the action of the court in sustaining an objection to the question asked of a certain witness as to whether Police Officer Hanney had tried to intimidate her by threatening to prosecute her for perjury. The only purpose of the question could be to discredit the testimony of said officer by showing an unfair anxiety to convict the defendant. However, as to this, in fairness to him, before the effort was made to impeach him his attention should have been called to the circumstance in order that he might have an opportunity to acquit himself of any just censure, or, at least, to explain what occurred. Moreover, the consideration is not of sufficient importance to justify a reversal of the cause.

The only ruling during the trial that is worthy of serious consideration relates to the admissibility in evidence of certain ashes containing, according to the testimony of Dr. Nahl, the fragments of human bones and also certain surgical instruments that were found in the washstand in the bedroom where the crime was committed. As to the first, however, there was strong circumstantial evidence that said ashes were the product of a fire made by the defendant to destroy the foetus, in accordance with her statement made to Mrs. Johnson. At least, the showing was sufficient to justify its consideration by the jury. [3] In reference to the surgical

instruments, consisting of a catheter and sound, they are admittedly of a nature to be used in the commission of such an offense as was charged against the defendant. It is true that there is no positive evidence that they were used by her in the present instance, the prosecutrix only identifying a certain speculum as having been used by defendant, but there are circumstances, which we need not detail, sufficient to justify the inference that they were so used. The case in that respect is entirely different from *People v. Hill*, 123 Cal. 571, [56 Pac. 443], and *People v. Muhly*, 11 Cal. App. 129, [104 Pac. 466], wherein no connection by either defendant with the material object was shown. Herein, not only is there circumstantial evidence that defendant used these instruments, but it was admitted by her without objection that she owned them and had them in her possession at the time the alleged offense was committed. The fact that they were adapted to such use and were owned by her at the time of the commission of the crime, and were so near at hand, afforded at least some evidence that she had made preparation for the commission of this particular offense. In this connection it may be stated that no explanation was made by defendant as to why or for what purpose she had these instruments, and no objection was made to their introduction in evidence upon the ground that they tended to show the commission of another offense than the one charged against her. In the cases cited above it may be further said the evidence of guilt was slight and unsatisfactory, while here it is full and persuasive.

Before concluding, we may state that the case of *People v. Josselyn*, 39 Cal. 393, involves a very different state of facts from the case before us. Therein there was no corroboration of the testimony of the prosecutrix and it is only instructive in the present instance in its discussion in the supplemental opinion of the court as to the character of the corroboration that is required to justify a conviction. Herein, as we have before seen, there was ample corroboration not only by the testimony of a disinterested witness, but also by an array of circumstantial evidence that is quite significant and potential.

We deem it unnecessary to notice further the various contentions of appellant, as after careful examination of the whole record we are entirely satisfied that the defendant was justly convicted and that there is no substantial merit

in any of the points made for a reversal. The judgment and order are, therefore, affirmed.

Ellison, P. J., *pro tem.*, and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 4, 1919.

All the Justices concurred except Melvin, J., who was absent.

[Civ. No. 2905. First Appellate District, Division Two.—October 6, 1919.]

ELIZABETH CALVERT et al., Appellants, v. G. G. BURNETT ESTATE COMPANY, INC. (a Corporation), Respondent.

- [1] **NEGLIGENCE—OWNERSHIP OF PREMISES—DUTY TO REPAIR.**—While an owner is primarily responsible for the repair of all portions of his premises, he is not an insurer with reference to the condition thereof generally, but must have notice of defects before he can be held liable in damages for failure to repair.
- [2] **ID.—DEFECTIVE CONDITION OF LEASED PREMISES—INJURY TO THIRD PERSONS—WHEN OWNER RESPONSIBLE.**—Ordinarily, the owner of a building which is in the possession of a tenant is not liable to third persons for injuries resulting from a defective condition of any portion of the premises unless the building was defectively constructed or he had notice of such defective condition.
- [3] **ID.—DUTY OF OWNER TO REPAIR SIDEWALK—CONSTRUCTION OF SAN FRANCISCO CHARTER.**—The provision of section 16 of chapter 2 of article VI of the charter of the city and county of San Francisco that "until the sidewalk or roadway of any improved street in the city and county of San Francisco is finally accepted . . . the obligation to repair, reconstruct or improve the same is imposed upon the owner or owners of the lots fronting thereon," does not make the owner of property an insurer of the safety of persons using the sidewalk in front thereof, nor a guarantor that the sidewalk contains no openings.

1. Necessity of notice by tenant to landlord of need of repair during term, note, Ann. Cas. 1912B, 353.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. E. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. Schapp and W. H. R. McMartin for Appellants.

A. P. Black and Black & Clark for Respondent.

LANGDON, P. J.—This is an appeal by the plaintiffs from a judgment in favor of the defendant in an action to recover for personal injuries sustained by the plaintiff, Elizabeth Calvert, and alleged to have been caused by the negligence and carelessness of the defendant corporation in permitting and allowing the sidewalk in front of a building owned by it to become defective. The defendant corporation is and was at the time of the accident the owner of a certain building on Turk Street, near Market Street, which was occupied by a tenant holding under a written lease. The facts are practically undisputed, and the court found that at the time of the leasing of the premises by the defendant to the tenant, the said premises, including the sidewalk in front thereof, were in first-class condition and that there were no holes, breaks, or depressions or other defects of any kind whatsoever in the sidewalk, and that said premises were in all respects in good condition; that the tenant expressly agreed in the said lease that all repairs necessary to the said premises should be made by said tenant at its own cost and expense and that the lessor should not be called upon to make any repairs whatever; that the lease was in full force and effect at all times mentioned in the complaint; that whatever holes or breaks may have occurred in the sidewalk were made without the knowledge of the defendant and without any negligence on the part of the defendant, and that they were not either knowingly, negligently, or carelessly allowed or permitted to remain or continue in said sidewalk by said defendant. The evidence is undisputed that the defendant had no knowledge of any breakage in the sidewalk until after the accident. Upon these facts the record presents but one question: Whether the owner of a building is liable in damages for injuries resulting from failure to keep the sidewalk

in repair, where the building has been leased and is being occupied by a lessee who has agreed to repair, and where the owner has no notice of any defect in the sidewalk, and there are no facts in evidence which would have put a reasonably prudent man upon inquiry.

Appellant admits that formerly, in this state, the owner of property was not liable for failure to keep the sidewalk in front thereof in repair. She recognizes the rule as announced in the case of *Eustace v. Jahns*, 38 Cal., at page 17, where the court said, in speaking of the duty of a property owner to repair the public highway: "As the defendant's responsibility in this action, if any exists, rests solely upon allegations of nonfeasance, or neglect of duty, devolved from the fact of his possession and control of the lot fronting on the side of the street where the defect occasioning the injury existed, and not upon any pretense or allegation of any affirmative action, misfeasance, or malfeasance, it follows that unless there exists some positive legislative enactment imposing such duty, the responsibility cannot attach. From a most careful consideration of all the statutes relating to the public streets and highways of the city and county of San Francisco, we find no personal duty primarily or inceptively cast upon the individual owners of lots or lands therein, in respect to the care, management, control, improvement, or repair of the public streets and highways. . . ."

In the case of *Martinovich v. Wooley*, 128 Cal. 143, [60 Pac. 760], the court says: "A sidewalk is a part of the highway. (*Bonnett v. San Francisco*, 65 Cal. 231, [3 Pac. 815]; *Ex parte Taylor*, 87 Cal. 94, [25 Pac. 258].) At common law, no duty was cast upon the owner of the abutting property to maintain the street in good repair. If such duty exists in this state it must be by virtue of some statutory enactment. Since culpable negligence cannot exist except from failure to perform a duty imposed by law or by contract, if the duty to repair the sidewalk in this instance was not cast upon defendants they were not responsible for its condition, and the general demurrer was properly sustained." The court then calls attention to the statutory provision wherein it is made the duty of the superintendent of streets to require by notice in writing the making of necessary repairs by the property owners, and also calls attention to the fact that the statute imposes a liability upon the property

owner for injuries occasioned by defects in the street fronting his property if such defects shall have existed for the period of twenty-four hours or more after notice thereof by the superintendent of streets. The court then quotes from the case of *Eustace v. Jahns*, *supra*, and declares the law to be that a duty to repair is cast upon the property owner only after notice given by the superintendent of streets as required by the act, and after such notice has been disregarded for the specified time.

The appellant in the present case contends that the law has been changed since these cases were decided; that amendments to the charter of San Francisco have placed a primary responsibility upon owners of property with relation to the repair of the sidewalk in front of the same and that such responsibility is not dependent upon notice by the superintendent of streets of a defective condition. Reliance is placed upon the portion of section 16 of chapter 2 of article VI, which provides that "until the sidewalk or roadway of any improved street in the city and county of San Francisco is finally accepted . . . the obligation to repair, reconstruct or improve the same is imposed upon the owner or owners of the lots fronting thereon." The appellant points out that section 21 of the Statute of 1862, page 401, providing that not less than the whole width of the street shall be accepted, has been changed by section 23 of the present charter, which provides that not less than the width of the roadway shall be accepted, and argues that this change indicates an intention that the city shall not now accept the sidewalks. This argument is supported further by calling attention to other amendments to the charter which appellant construes as indicating an intention in harmony with her views. Upon this assumption appellant's argument proceeds, and it is urged that as the sidewalk in the case at bar was not accepted, the above-quoted provision of section 16, chapter 2 of article VI, becomes applicable. Reliance is then placed upon section 5, article I, providing that no recourse shall be had against the city and county for damages suffered by reason of the defective condition of any sidewalk which has not been finally accepted by the supervisors of the city and county as by law or in the charter provided, but in any such case, the person or persons on whom the law may have imposed the obligation

to repair such defect in any such sidewalk shall be liable to the party injured for the damage suffered or sustained.

In passing we call attention to the fact that the language of section 16, above quoted: "Until the sidewalk . . . is finally accepted . . .," by its very terms recognizes the fact that at some time certain sidewalks may be accepted. But we deem it unnecessary for us to decide here whether or not the city accepts the sidewalks in accepting the "roadway," or whether a change has been made in this respect by the amendments to the charter upon which appellant relies. Because, even though we accept appellant's position, for the purpose of the determination of this case, and agree that the sidewalk in front of defendant's house was not accepted, and that the primary responsibility for its repair rested upon the abutting property owner, and that he was not entitled to formal notice of defects from the superintendent of streets—yet the above-quoted language of the charter imposing upon the owner such responsibility and declaring his liability for injury suffered by reason of his failure to meet his obligation in this respect—is not such as to make the owner an insurer of all persons passing along said sidewalk. We think if such an unusual liability were sought to be placed upon owners of property, that the charter would have been more specific in stating it. [1] An owner is primarily responsible for the repair of all portions of his premises, and yet he must have notice of defects before he can be held liable in damages for failure to repair. He is not an insurer with respect to the condition of his premises generally, although primarily liable. It seems clear to us that even if the appellants' contention be granted, nevertheless the owner is only liable for failure to perform the duty to repair his sidewalk, placed upon him by the charter, under the same circumstances as she would be liable for the failure to repair any other portion of the premises of which he is the owner, i. e., he is liable for a negligent failure to repair, and negligence cannot exist without knowledge of defects or circumstances which would put a prudent man upon inquiry. Even conceding that the defendant is not entitled to the formal notice by the superintendent of streets, he must yet have some notice—some knowledge of the need of repairs acquired in some manner.

In the case of *Kalis v. Shattuck*, 69 Cal. 596, [58 Am. Rep. 568, 11 Pac. 346], the court says that it is well settled that a landlord is not liable for the consequences to the plaintiff of a nuisance in connection with a building in the possession and control of his tenants unless: "1. The nuisance occasioning the injury existed at the time the premises were demised; or 2. The structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it (*Jessen v. Sweigert*, 66 Cal. 182, [4 Pac. 1188]; *Rector v. Buckhart*, 3 Hill (N. Y.), 193; *Mullen v. St. John*, 57 N. Y. 567, [15 Am. Rep. 530]; *Hussey v. Ryan*, 64 Md. 462, [54 Am. Rep. 772, 2 Atl. 729]; 11 Cent. Rep. 626; Wood on Nuisances, secs. 295, 676; Wood on Landlord and Tenant, 918); or 3. The landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury." Appellant argues that the present case comes within the second class because, as any sidewalk was bound to wear out in the course of time with the ordinary and reasonable use of the same for the purpose for which it was constructed, that it was bound in time to become a nuisance. We think the court did not mean that everything which was not absolutely impervious to wear and tear was to be in contemplation of law a prospective nuisance. [2] And as we see from the language last quoted, ordinarily the owner of a building which is in the possession of a tenant would not be liable to third persons for injuries resulting from a defective condition of any portion of the premises unless the building had been defectively constructed or he had notice of such defective condition. Practically the same rule has been applied with regard to a sidewalk in front of premises, for in the case of *Frassi v. McDonald*, 122 Cal. 404, [55 Pac. 139], the court said: "The owner of property fronting on the street is not an absolute guarantor that no opening may be found in his sidewalk. . . . Before liability attaches to the owner in such a case, he must have known of its defective condition, or as a careful, prudent man, should have known it." This case is quoted with approval in the case of *Rider v. Clark*, 132 Cal. 387, [64 Pac. 564]. In the latter case the court lays down the rule that when a tenant enters into possession under a lease, the landlord parts with all his right to and control

over the premises and is not liable to third persons, except for such defects in the premises or defective construction as existed in the premises when let to the tenant, and numerous authorities are cited in support of this statement. The liability in actions like the present is predicated upon negligence or want of care. The landlord cannot be guilty of negligence in failing to repair when he does not know of any defect in the premises and is not charged with such knowledge as a reasonable man. This seems to be the law, not only in this state, but in other jurisdictions as well. (*Hutchinson v. Cummings*, 156 Mass. 329, [31 N. E. 127].)

Unless the provisions of the charter relied upon by the appellant make the owner an insurer, the findings of the trial court that the holes in the sidewalk alleged to have caused the injury to the plaintiff were made without the knowledge of the defendant, and that they were not knowingly, negligently, or carelessly allowed or permitted to remain or continue in said sidewalk by the defendant, make necessary its conclusion that the defendant in the present action is not liable. [3] It is not necessary for us to discuss the relative rights and duties of the defendant and the city authorities under the charter provisions relied upon by the appellant. It is sufficient for the present case to decide that such provisions do not make the owner of property an insurer of the safety of persons using the sidewalk, nor a guarantor that the sidewalk contains no openings.

The judgment is affirmed.

Nourse, J., and Brittain, J., concurred.

[Crim. No. 671. Second Appellate District, Division One.—October 7, 1919.]

In the Matter of the Proceedings for the Disbarment of
W. J. HITTSON, an Attorney at Law.

[1] ATTORNEY AT LAW — DISBARMENT — EVIDENCE — FINDINGS — JUDGMENT.—In this proceeding for the permanent disbarment of an attorney at law, although there was a conflict in the evidence relating to the several charges against the accused, there was evidence of a substantial nature supporting the material allegations

on each of the three counts on which the judgment of disbarment was founded, and the facts found established that the accused was guilty of professional misconduct and showed that he was wanting in that integrity of character and conduct which the law rightfully requires from an attorney at law.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge. Affirmed.

The facts are stated in the opinion of the court.

Gesner Williams, W. I. Gilbert, John S. Cooper, Alfred F. MacDonald and S. W. Thompson for Appellant.

W. J. Ford, Frank C. Collier and Henry G. Bodkin for Respondent.

CONREY, P. J.—The judgment from which this appeal is taken is a judgment permanently disbarring the appellant from the right to practice as an attorney and counselor in the courts of this state. The accusation was filed on behalf of the Bar Association of Los Angeles County. The court found that the allegations contained in the first, third, and fifth counts of the accusation are true. The judgment is based upon those findings.

Briefly stated, the first count charged that while appellant and one Cleveland Schultz, also an attorney at law, were employed by one Plevros to represent him in the defense of a certain action, Plevros paid into the hands of said attorneys \$142.50 to be applied on the payment of any judgment rendered against Plevros in said action, and for no other purpose; that judgment was rendered against him in the sum of \$22.05; that said attorneys, although having in their joint possession the money so delivered to them by Plevros, converted the money to their own use, did not pay the judgment and refused to return the money or any part thereof to Plevros. It appears from the evidence that Schultz did pay the amount of the judgment without formal entry thereof. The evidence is, however, sufficient to justify the finding on this count as to all other facts alleged. Plevros had paid said attorneys a separate cash fee for the defense of said action, and the evidence was sufficient to prove that they were not entitled to retain the additional sum for their services.

The third count charges that in a criminal action in the justice court of Ballona Township, in Los Angeles County, appellant qualified as surety for the defendant on a bail bond in the sum of \$250, and in connection therewith testified that he was at that time the actual owner of eight lots in the county of Riverside, that said lots were at that time of the value of \$250 each, and were at that time assessed for the sum of fifty dollars each by the assessor of Riverside County. The accusation then alleged that in fact Hittson did not at that time own any lots whatsoever in Riverside County; that in making such affidavit he well knew that he did not own said lots and that his statement was made for the purpose of defrauding the justice of the peace and of enabling him to qualify on said bond. The justice of the peace in his testimony stated that at the time in question and upon becoming surety on said bond Hittson was sworn as to his qualifications and testified that he owned eight lots just outside of the city of Riverside, in the county of Riverside, that they were assessed at fifty dollars each, and that their real value was \$250 each; that Hittson gave no description of said lots, but promised to mail to the justice a detailed description thereof, which, however, he did not do. There is other evidence which, in our judgment, is sufficient to support the court's conclusion that appellant did not own any such lots.

The fifth count of the accusation alleges that appellant was employed by one Sagar to prosecute an action against one Lange for damages arising out of a collision with an automobile; that instead of commencing such action appellant framed a complaint as stating a cause of action for indebtedness for labor performed and services rendered, and in connection therewith filed an affidavit for attachment wherein it was stated that the amount demanded was due to the defendant upon an express or implied contract for the direct payment of money; that appellant knew when he commenced said action and when he filed said affidavit for attachment that said money was not due for services rendered or labor performed. The record shows that the complaint was made and the affidavit for attachment filed as stated in the accusation. The testimony of Sagar is to the effect that in his statement of facts to appellant he told appellant that his claim was for damages to the machine in the collision and that he did not tell Hittson that he had performed any labor for the defend-

ant, or that he had any claim against the defendant for work and labor.

[1] The points urged in support of the appeal are each and all directed to the claim made on behalf of appellant that the evidence is insufficient to support these several accusations. It may be admitted that there is a conflict in the evidence relating to these several charges against appellant; nevertheless, after reading the record we are satisfied that there is evidence of a substantial nature supporting the material allegations on each of the three counts on which the judgment is founded. That is sufficient for the purposes of this appeal. (*In re Morton*, 179 Cal. 510, [177 Pac. 453]; *In the Matter of Danford*, 157 Cal. 425, [108 Pac. 322].) The facts found established appellant's guilt of professional misconduct and showed that he is wanting in that integrity of character and conduct which the law rightfully requires from an attorney at law.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 4, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 3043. First Appellate District, Division Two.—October 8, 1919.]

WALTER J. SALOMON, Appellant, v. CAWSTON OSTRICH FARM (a Corporation), Respondent.

[1] GUARANTY—CONSTRUCTION—CHANGE IN SUBJECT TO WHICH GUARANTY APPLIES—RELEASE OF GUARANTOR.—The obligations of a guarantor are to be strictly construed; and where, upon default in the payment of rent, the landlord by summary proceedings takes possession of the leased premises and, without the knowledge or consent of the guarantor of the lease, subdivides it, thereby rendering it less rentable, of lower value and incapable of being rented as a single tenement, the guarantor is released.

43 Cal. App.—30

APPEAL from a judgment of the Superior Court of Los Angeles County. H. T. Dewhirst, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Bond & Babson and Wm. T. Craig for Appellant.

Donald Barker and Arthur R. Smiley for Respondent.

BRITTAİN, J.—The plaintiff and appellant sued the defendant as a guarantor of a lease made and performable in New York. The trial court rendered judgment for the plaintiff for \$2,197.48, the unpaid portion of rent for the month of October, 1914, with certain surcharges. The appellant maintains the judgment should have been for \$6,045.36, to include the difference between the rental specified in the lease and that received between November 1, 1914, and April 1, 1915.

The appellant leased to the respondent, a California corporation, for five years, the most northerly store and basement thereunder, on the Fifth Avenue side of the Bristol Building, at Fifth Avenue and Forty-second Street, in New York. The single store was seventeen feet wide. The front of the store consisted of the show-windows and entrance, with two stone pilasters. The lease was assigned by the California corporation to a New York corporation of a similar name, and by the latter to a Mrs. Cohen. The landlord consented to each assignment. The trial court accepted the views of the appellant, based on decisions of the New York courts, that the original lessee was the guarantor of each assignee successively for the rents reserved in the lease. (*Manley v. Berman*, 60 Misc. Rep. 91, [111 N. Y. Supp. 711]; *Ranger v. Bacon*, 3 Misc. Rep. 95, [22 N. Y. Supp. 551]; *Wallace v. Dinniny*, 11 Misc. Rep. 317, [32 N. Y. Supp. 159]; *People v. German Bank*, 126 App. Div. 231, [110 N. Y. Supp. 291]; *Zinwell Co. v. Ilkowitz*, 83 Misc. Rep. 42, [144 N. Y. Supp. 815].) The respondent prosecutes no cross-appeal from the judgment. It is, therefore, unnecessary to consider any change in the legal status of the parties which may have resulted from a later express guaranty by the respondent of the performance of the conditions of the lease by the first assignee. The lease provided that, in the event the landlord

should take possession of the premises by summary proceedings after the default in rent, he should relet the premises or any part thereof, and the lessee should pay the difference between the amount of rent reserved in the lease and that collected as rent of the demised premises.

In October, 1914, Mrs. Cohen, having defaulted in the payment of rent, the landlord took possession under summary proceedings. Prior to that time, at the instance of Mrs. Cohen, he had unsuccessfully made some attempt to rent the premises as they were. After taking possession, he made no effort to rent the premises as a whole, but removed the entire front, and by the removal of the two pilasters increased the glass area four or five feet in width. He also divided the store in two by a longitudinal partition two inches thick and put two doors in the front instead of one, thus changing the demised store into two new stores, each somewhat less than eight and a half feet wide. None of the changes were made because of needed repairs or for the preservation of the premises.

The plaintiff took possession about November 1st. The changes were completed about November 15, 1914. Neither Mrs. Cohen nor the defendant had any knowledge of, or consented to, the changes.

It was found the plaintiff used due diligence in his efforts to obtain a tenant or tenants, and that he did relet the said premises for sums segregated between the two new tenements for various terms between November 1, 1914, and the end of March, 1915. It was further found that the plaintiff thought two smaller stores would be more rentable than one large store. Upon conflicting evidence, the trial court found that certain affirmative allegations of the answer were true. Among these were that by the alterations the premises were so changed that they were not adapted to the use of one tenant; that the premises were more valuable for rental purposes and more readily rentable as one store than as two, and that, if the alterations had not been made, the plaintiff could have obtained in the reletting an amount of rental equivalent to the rental payable under the lease. There was sufficient evidence to sustain these findings. Upon them the trial court concluded that by the summary proceedings and the subsequent acts of the plaintiff the lease was terminated, and that the plaintiff was entitled to recover the net amount of rents,

with surcharges unpaid for the month of October, 1914, in which the plaintiff resumed possession. The implication necessarily follows that the plaintiff was not entitled to the difference between the rents collected and those reserved in the lease after the lease was terminated. The only real question presented on this appeal is whether or not, despite the evidence and the findings, the conclusion of law upon this subject was correct.

The appellant contends that, since under the lease he had the right to relet the premises in whole or in part, he had the further right to divide them into two stores. He relies upon the doctrine announced in New York: "The spirit of the agreement required him to lease again the same subject which he had demised to the first lessee. If he elected to make it more valuable, it was without any authority from the lessee or his surety, the defendant. They cannot complain, as they are not prejudiced by the improvements; if they are benefited by them, it is an advantage which the plaintiff has chosen to confer upon them without any agreement or obligation on their part to reimburse him." (*Hackett v. Richards*, 13 N. Y. 138; *McCready v. Lindenborn*, 172 N. Y. 400, [65 N. E. 208].)

The respondent maintains that its obligation as a guarantor could not be extended beyond the terms of the guaranty. Under the New York rule, as announced in the quotation just made, the agreement required the landlord to lease the same subject which he had demised to the first lessee. In the present case the landlord entirely changed the identity of the premises demised to the first lessee and created two new tenements. Under the New York case it was held that the lessee and his guarantor could not complain because they were not prejudiced by the improvements to the original premises. In this case the trial court found that the guarantor was injured by the changes which had been made, because the premises thereby became less rentable, of lower value, and incapable of being rented as a single tenement. The appellant argues that the finding of the trial court is not supported by the evidence, because under the present lettings the rentals are twenty thousand dollars per annum, or two thousand dollars a year higher than the highest rentals reserved in the original lease. The lease provided that if increased rentals were collected, the excess over the reserved rents was to be divided

between the lessee and the owner, but the owner reserved the right at any time within six months, by notice, to deprive the lessee of the benefit of this clause. In the present case the landlord sought to recover the deficiency of rentals for the period of six months. The argument, based upon the profits made by the landlord after the expiration of the six months, does not tend to show that he might not have rented the premises originally demised for an amount equivalent to the reserved rentals during the six months. The finding of the trial court upon this subject is conclusive of the appellant's claim in this regard. The utmost the respondent did was to guarantee the deficiency of rentals of the subject of the original lease. [1] In New York, as well as in California, the obligations of the guarantor are strictly construed. Any change made by the person to whom performance is due in the subject to which the guaranty applies, without the knowledge or consent of the guarantor, releases the latter. (*Page v. Krekey*, 137 N. Y. 307-314, [33 Am. St. Rep. 731, 21 L. R. A. 409, 33 N. E. 311]; *City of New York v. Clark*, 84 App. Div. 383, [82 N. Y. Supp. 855]; *Wilkesbarre Realty Co. v. Powell*, 86 Misc. Rep. 321, [149 N. Y. Supp. 209].)

The judgment is affirmed.

Nourse, J., and Langdon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 4, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2048. Third Appellate District.—October 8, 1919.]

T. TAKEBA, Petitioner, v. THE SUPERIOR COURT OF
SAN JOAQUIN COUNTY et al., Respondents.

[1] RECEIVERS—ACTION IN UNLAWFUL DETAINER—RIGHTS OF PARTIES—PROHIBITION.—In a proceeding in prohibition brought for the purpose of determining the right of the superior court to appoint a receiver in an action in unlawful detainer, the appellate court cannot decide the controversy between the parties as to the ownership of the fruit grown on the land in question.

- [2] **ID.—APPOINTMENT OF IN UNLAWFUL DETAINER ACTIONS—CODE AMENDMENT NOT RETROACTIVE.**—The 1919 amendment to section 564 of the Code of Civil Procedure, authorizing the appointment of a receiver in an action in unlawful detainer in which the superior court has exclusive original jurisdiction, deals with the substantive rights of the parties as well as in the matter of a remedy and, therefore, is not applicable to actions instituted prior to the date it went into effect.
- [3] **ID.—LITIGATION AS TO TITLE TO PROPERTY—DANGER OF LOSS—POWER TO APPOINT RECEIVER.**—Where the dispute in litigation is as to the title to the property involved therein and it is made satisfactorily to appear that the property is of such a character or is in such a situation that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties.
- [4] **ID.—SUFFICIENCY OF APPLICATION FOR APPOINTMENT—REVIEW ON PROHIBITION.**—Where the order appointing a receiver in a given case is within the jurisdiction of the court, whether the facts disclosed to the court on the application for the appointment are such as legally to warrant it in putting in operation or applying its jurisdiction in that regard cannot be inquired into or reviewed on an application for a writ of prohibition.
- [5] **ID.—PERSONS INTERESTED NOT MADE PARTIES—JURISDICTION OF COURT NOT AFFECTED.**—The power of the court to appoint a receiver in a given case is not affected by the fact that certain persons who claim an interest in the property of which the receiver is to take possession are not made parties to the action and, therefore, are without opportunity to protest in court against the appointment of the receiver.

PROCEEDING in Prohibition to correct the action of the Superior Court of San Joaquin County, and George F. Buck, Judge thereof, in appointing a receiver. Alternative writ discharged.

The facts are stated in the opinion of the court.

3. Appointment of receivers generally, note, 72 Am. St. Rep. 29.

Power of court to appoint receiver for purpose of development or preservation of realty, note, Ann. Cas. 1915D, 1034.

W. Goodwin Williams, John R. Cronin, G. M. Steele and George F. McNoble for Petitioner.

Wm. E. Kleinsorge, Elliott & Atkinson, C. E. Fleming, R. L. Beardslee and Arthur L. Levinsky for Respondents.

HART, J.—This is an original application for a writ of prohibition. The petition alleges as follows:

That there is pending in the superior court, in and for the county of San Joaquin, before Honorable George F. Buck, the judge thereof, an action in which Charles W. Mier is plaintiff and M. Mizushima is defendant. In the complaint in said action it is alleged that plaintiff is the owner and entitled to the possession of certain real property in the county of San Joaquin; that, on the fourth day of November, 1918, Laura M. Eagan was the owner of said property; that she and defendant entered into a lease of said property, among the terms of said lease being the following: That the terms of the contract should apply only to the crops grown on said land during the season of 1918-19; the tenant agreed to furnish all labor and supplies free of cost to the owner and agreed properly to cultivate said land; all fruit grown upon the land was to be marketed in the name of the owner. Said lease contained the following covenant: "It is further understood and agreed that should said owner sell the whole or any part of said ranch during the life of this agreement, and the purchaser is not willing to abide by the terms of this agreement, then said tenant will accept reasonable compensation for his labor up to that time performed on the whole or the portion of said ranch which may be sold. In case of disagreement as to the amount of compensation to which said tenant shall be entitled for said labor performed, each of the parties, said owner and said tenant, may select an arbitrator, and those two may select a third person and a decision of a majority of said three arbitrators shall be accepted as final and binding on the parties to this agreement."

It was then alleged in the complaint that defendant entered into possession of the land and was in possession thereof at the time of the commencement of the action. "That on the second day of May, 1919, said Laura M. Eagan sold and conveyed said above-described real property to the plaintiff herein, and so notified said defendant in writing" on said

day; that the plaintiff was not willing to abide by the terms of said lease, as provided in the portion of the lease above quoted, and that, on the second day of May, 1919, plaintiff and Laura M. Eagan tendered defendant the sum of one thousand dollars "for and as reasonable compensation for the labor of said defendant performed on said premises during the term of said lease," which tender defendant refused to accept; that, on the 3d of June, 1919, plaintiff notified defendant in writing of the appointment of an arbitrator and demanded that defendant appoint another, for the purpose of fixing the amount of compensation to be paid defendant for his labor, which defendant neglected and refused to do; and that, on said last-mentioned date, plaintiff caused to be served on defendant a notice to quit and surrender possession of said premises, which defendant refused; that approximately thirty acres of said land were planted to peach trees and approximately fifteen acres to apricot trees, and that the crop of apricots was ready to be harvested and was of the value of four thousand five hundred dollars; that defendant wrongfully claims the ownership of said apricots and that unless restrained he will sell and dispose of said crop. The prayer of the complaint was for judgment for restoration of the premises and that defendant be ordered to surrender possession thereof upon the payment of a reasonable compensation for his labor; and that defendant be restrained from selling or disposing of said crop of apricots or committing any waste of the premises.

On the eleventh day of June, 1919, the court issued a restraining order as prayed for in the complaint and set the sixteenth day of June as the date upon which defendant might show cause why an injunction should not issue. On said last-named date, defendant filed an affidavit in opposition to the issuance of an injunction, a hearing was had upon the order to show cause, and the restraining order was dissolved. On the twenty-ninth day of July, 1919, defendant filed an answer in the action.

On August 8, 1919, an affidavit was filed in support of plaintiff's application to have a receiver for the premises appointed and, on August 11th, defendant filed an affidavit in opposition thereto. On August 12, 1919, the court appointed E. A. Humphrey as receiver of said real property.

The petitioner herein, T. Takeba, on August 19, 1919, filed a petition in said action in which it was alleged that, on the 18th of June, 1919, the defendant, Mizushima, had conveyed to one J. A. Ballantyne all his right, title, and interest in and to said crop of apricots, and that, on June 24th, said Ballantyne, for a good and valuable consideration, sold said crop of apricots to petitioner; that, subsequent to the 24th of June, 1919, petitioner harvested and sold said crop of apricots; that there was a crop of peaches growing upon said land which the receiver threatened to harvest. Petitioner asked that the court revoke or modify the order appointing receiver; that the receiver be directed to cease from interfering with petitioner in the harvesting of said crop of peaches, and that he surrender full possession and control to petitioner of said crop.

Said petition of T. Takeba came on for hearing in the superior court on the twenty-second day of August, 1919, and was by the court denied.

The petition for writ of prohibition was filed in this court on the twenty-sixth day of August, 1919, and, after setting out the proceedings above referred to, alleged that the receiver was in possession of and was harvesting said crop of peaches and threatened to sell and dispose of the same; that petitioner had no knowledge of the application made for the appointment of said receiver, nor was he afforded any opportunity to be heard in opposition thereto. The prayer of the petition is for a writ of prohibition directed to the superior court of the county of San Joaquin and to the receiver to prohibit them from exercising any control over the property of petitioner, and that all property taken by respondents be restored to petitioner.

The petition here asks that the writ prayed for be made to run against the receiver as well as against the court appointing the receiver; but, as is said in *Havemeyer v. Superior Court*, 84 Cal. 327, 389, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 127, 137], "the property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver, which holds, administers and disposes of the property in his hands; and so long as the property remains undisposed of, action by the court is necessary. . . . The writ runs to the court and oper-

ates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority."

The sole and only question to be determined in this proceeding is, manifestly, whether the respondent court stepped beyond its jurisdiction in appointing a receiver in the case of *Mier v. Mizushima*, mentioned above, and in taking, through the receiver so appointed, possession of the fruit referred to in the petition for this writ.

[1] Numerous affidavits have been filed herein touching the merits of the controversy—that is, affidavits addressed to the question as to the ownership of the fruit. But we cannot decide that controversy in this proceeding. If it appears that the court was within its jurisdiction under the law in appointing the receiver, then the inquiry, so far as this proceeding is concerned, is at an end.

[2] Section 564 of the Code of Civil Procedure enumerates, in as many different subdivisions thereof, a number of occasions upon which, upon a proper showing, the superior court may appoint a receiver. As said section read before an amendment thereof by the legislature of 1919, whereby a new subdivision was added thereto, the only subdivision of said section from which the authority for the appointment of a receiver could be drawn in a case of the character of the one involved herein was subdivision 6. In 1919, however, the legislature added to the section the following provision, numbered 6: "In an action of unlawful detainer, in those cases in which the superior court has exclusive original jurisdiction." The subdivision which, previous to said amendment, was numbered 6 is still retained in said section as number 7.

The amendment above mentioned did not take effect until ninety days after the adjournment of the legislature of 1919 (Const., art. IV, sec. 1. See p. 204, Treadwell's Const.), which was on the twenty-second day of April, 1919. The action involved herein, in which the receiver was appointed, was instituted on June 10, 1919, which was before the amendment referred to went into effect.

It is contended by the attorneys for the respondents that the said amendment of section 564 of the Code of Civil Pro-

cedure, since it involves a change only in the matter of a remedy, is retroactive in its effect and that, therefore, the respondent court acted, when appointing the receiver, within or under a provision of law expressly authorizing the appointment of a receiver in cases of unlawful detainer, of which said court has original jurisdiction, and that this is such a case. We are unable to coincide with that view. The power vested by the codes in superior courts to appoint receivers in actions pending before them involves in its effect more than a mere remedy. Of course, the power is in a sense remedial, but in its exercise the substantive rights of the parties are necessarily dealt with. When exercised, it means the taking of property by the court from one who may turn out to be the rightful owner thereof, and transferring it, *pro re nata*, to an agent of the court vested with power to handle and dispose of it according as the court may direct for the purposes of the action in which such agent or receiver is appointed. There is no power vested in the courts more jealously guarded or safeguarded than this very power to appoint a receiver to take, for the court, the possession and control of the property of others, and this is because, as above suggested, the exercise of the power may mean the divesting the owner of his lawful right to remain in possession of his property. It is, therefore, obvious that, while the power to appoint a receiver is provisional and an ancillary remedy, its scope may go beyond that of a mere remedy and strike at the very substance of a person's property rights. It cannot, therefore, be well contended that a legislative amendment extending the power of the superior courts in the matter of appointing receivers or giving such courts the right to appoint an officer with the usual powers of such a representative of the court is retroactive. At the time the court made the appointment in this case, it was limited in its power to do so by the law as it then read. The legislature having taken upon itself the right to name the cases in which a receiver may be appointed, its statute enumerating those cases is the measure of the power of the superior courts in that particular, and if the right to appoint a receiver in this case did not exist by virtue of the statute when the appointment was made, then it is very obvious that the court was without authority to make the order.

But we think the respondent court was authorized to act in this case, upon a proper showing, of course, upon the provi-

visions of what was formerly subdivision 6 of the code section above named, but which is now, and has been since the above considered amendment of 1919, subdivision 7. It reads: "In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

[3] Where the dispute in a litigation is as to the title to the property involved therein and it is made satisfactorily to appear that the property is of such a character or is in such a situation as that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or to some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties. This means, of course, that the court itself may take possession or custody of the property and hold or dispose of it, according as the nature of the property or the exigencies of the situation with respect to it may require.

That the court did not transcend its lawful authority in making the appointment cannot, it seems to us, for a moment be doubted. Whether the facts disclosed to the court on the application for the appointment of a receiver were such as legally to warrant it in putting in operation or applying its jurisdiction in that regard in the action involved herein, presents another and an entirely different question, but one which we are precluded from inquiring into or reviewing in this proceeding. The sole function or office of the writ of prohibition is to arrest or prevent the prosecution of proceedings before or to be taken by any tribunal, corporation, board, or person, whether exercising judicial or ministerial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, etc. (Code Civ. Proc., sec. 1102), and will issue only where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., sec. 1103.) Thus it is plain that the sole object of the writ is to prevent the taking of some action or the doing of some act on the part of an inferior tribunal, board, etc., which has not been done but which such tribunal or board or person threatens to do. Obviously, as the very name

of the writ plainly implies, its object is not to undo something which has already been done. There is another writ whose specific office is to do that. (Code Civ. Proc., secs. 1067, 1068.)

[4] When the application was made for this writ, the very action to prevent which this writ was sought had already been done. The receiver had then been appointed and the action of the respondent court in that particular had been fully completed. But the theory of the petitioner in applying for this writ was that the order appointing the receiver was void and that, therefore, as was held in the Havemeyer case, *supra*, the action of the receiver in taking the property and threatening to dispose of it constituted the action and the threatened action of the court which could be prevented through the operation of this writ. We hold, however, that the order appointing a receiver here was, under the law, within the jurisdiction of the court. In the Havemeyer case, the respondent court, in a proceeding instituted by the attorney-general of the state in *quo warranto* against the American Sugar Refinery Company, a California corporation, to have the forfeiture of its charter declared, made an order appointing a receiver, and the supreme court held that the superior courts were wholly without the right or jurisdiction to appoint a receiver of a corporation in an action in *quo warranto*, the purpose of which is to cause its charter to be forfeited, and that, therefore, the appointment of a receiver in that case was void *ab initio*. Hence, it was said in that case that it was proper to arrest and annul the action of the receiver done under that void order, the action of the receiver within the scope of his assumed powers as such being the action of the court. It was further said in that case (quoting from the syllabi): "The operation of the writ of prohibition is primarily and principally preventive rather than remedial, and is excluded when the action of the inferior tribunal is fully completed, and nothing remains to be done under its void order, but if its action is only partially and not fully completed, further proceedings may be stayed, and in such case the office of the writ is so far remedial that it will annul such prior proceedings as may be necessary to make the remedy complete." Here, as before stated, the action of the court in appointing a receiver was fully completed, and when the receiver proceeded to exercise the functions or perform the

duties of his receivership, by taking charge of the property, he was then acting under a lawful and not a void order of the court and with full authority to do the things his office required of him. And so he has continued, as such receiver, to act in the premises in every step he has taken, so far as we are advised by the petition here. Obviously, this case is in no sense similar or analogous to the Havemeyer case.

[5] The plea of the petitioner that he was not a party to the action of *Mier v. Mizushima*, that he had no knowledge of the application by the plaintiff for the appointment of a receiver, and had no opportunity to be heard in opposition to said application, reveals as to him, perhaps, an unfortunate situation, but it does no more than that, so far as the present proceeding before us is concerned. The power of the court to appoint a receiver still existed, notwithstanding that he or other parties who might claim an interest in the property of which the receiver was authorized under his appointment to take possession were not made parties to that action. It may be and probably is true that at the time of the preparation and filing of the complaint in said action the plaintiff had no knowledge of any claim of petitioner to the fruit. In any event, as stated, the court's jurisdiction to appoint a receiver is in nowise affected by the fact that the petitioner was not a party to the suit and was without opportunity to protest in court against the appointment of the receiver.

We may add, although the suggestion is wholly gratuitous so far as the requirements of the decision herein are concerned, that the petitioner is not without an adequate and sufficiently speedy legal remedy. In the first place, it may be observed that, having in some way obtained a notice of the commencement of the action of *Mier v. Mizushima* (he filed a petition asking for the revocation of the order appointing a receiver), he could have intervened in that action and therein had his rights litigated and adjudicated. And he still has remaining to him an action against the receiver and his bondsmen in conversion or claim and delivery for the return of the property or for damages or the value thereof, in case it cannot be returned, for the wrongful taking and appropriation thereof, assuming it to have been so taken and appropriated.

However, it is plain that the writ of prohibition is not the proper remedy for the correction of the action of the court

in appointing the receiver in the action of *Mier v. Mizushima*, and the alternative writ or order to show cause must, therefore, be discharged, and it is so ordered.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 1962. Third Appellate District.—October 8, 1919.]

THE PEOPLE, Respondent, v. L. D. MACY et al., Appellants.

- [1] **RED-LIGHT ABATEMENT ACT—CHARACTER OF HOUSE—EVIDENCE—GENERAL REPUTATION.**—In an action brought under the "Red-light Abatement Act" for the purpose of abating a nuisance existing in a given house, evidence of the general reputation of the place may be of itself sufficient to prove the character of the house.
- [2] **ID.—BAD MORAL CHARACTER OF INMATES.**—In such a prosecution, evidence that the character of several inmates or frequenters of the place was morally bad is a circumstance of great importance in the determination of the character of the house.
- [3] **ID.—RESORT TO ARTIFICE AND STRATEGY BY INVESTIGATORS—ADMISSIBILITY OF TESTIMONY.**—In such a prosecution, the fact that the investigators resorted to artifice and strategy and placed themselves in an attitude of willingness to participate in the commission of an immoral and illegal act in order to obtain evidence of the character of the house in question would not render their testimony inadmissible.
- [4] **ID.—USE OF PLACE UNTIL GIVEN DATE—PRESUMPTION OF CONTINUANCE—REBUTTAL.**—In such a prosecution, from proof that the house in question was used for immoral purposes as late as a given date, and that there was a course of such conduct up to that time, the presumption would follow that the condition continued to exist as long as is usual for things or condition of such nature, this presumption being overcome only by satisfactory evidence that the condition had changed.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge. Affirmed.

The facts are stated in the opinion of the court.

Martin I. Welsh and V. L. Hatfield for Appellants.

John R. Robinson, District Attorney, for Respondent.

BURNETT, J.—The action was brought under the “Red-light Abatement Act” [Stats. 1913, p. 20], for the purpose of abating a nuisance existing in the Johnson House, a hotel in Chico, and of causing the same to be closed as provided by the provisions of said act. The judgment was in favor of the plaintiff, from which the owner of the premises has appealed. Three points are made by appellant, as follows:

1. He insists that the evidence is insufficient to sustain the judgment, for the reason that it consists solely of evidence of the general reputation of said house in the community.

2. It is claimed that the testimony of the two investigators or detectives, who testified in the case, cannot be considered by reason of the application of the doctrine of the “law of entrapments.”

3. The further claim is made that the evidence is insufficient to show that at the time of the filing of the complaint on the 14th of September, 1918, or at the time of the trial, one month later, the house was being used for said unlawful purposes, assuming that the evidence was sufficient to show such use on August 12, 1918, the date on which the last act of illicit intercourse and the reputation of the house were shown.

From reading and an examination of the record we are satisfied that there is no merit whatever in any of these contentions. As to the first point there was a strong showing of the bad reputation of the house in said community. The witnesses who so testified were persons of long residence there, or persons engaged in business in Chico, or persons whose calling would tend to make them familiar with the general reputation of any hotel in the community. They comprised business men, ministers, peace officers, and also women who were interested in the social conditions and welfare of the community. Their testimony was direct, clear, and unequivocal that the house had a bad reputation in the respects indicated. As an example of the general character of the testimony of these various witnesses we may quote from the record of the testimony of Galen L. Rose as follows: “Q. Do you know the general reputation of the Johnson House for lewdness, prostitution, or assignation? A. I do. Q. What is it—good or bad? A. Bad. (Cross-examination.) Q. With

whom did you discuss the reputation of the Johnson House, Mr. Rose? A. I have discussed it—it came up in a general way in a conversation with a considerable number of people—I do not know as I recollect the individuals; but is a topic that comes up frequently in a conversation in a general way. And in all of my conversations I never heard a good word for the Johnson House, and I heard a good many speak and they were that it was bad.” [1] It is to be observed that section 5 of said act provides: “In such action, evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance.” This would seem to imply that such evidence may be of itself sufficient to prove the character of the house, and upon this point it may be said that seldom is such a strong showing made as appears in the present instance. [2] But beyond that, there was strong evidence that the character of several inmates or frequenters of the hotel was morally bad, and this is a circumstance of great importance in the determination of the character of the house. (*De Martini v. Anderson*, 127 Cal. 33, [59 Pac. 207].) As an example of this line of evidence we may quote from the record of the testimony of William Alexander, formerly chief of police, as follows: “Q. Do you know of your own personal knowledge, Mr. Alexander, while you were acting chief of police of the City of Chico, of any woman of a lewd or immoral character going to the Johnson House? A. I do. I know of one Myrtle McNeal, who was, at one time an inmate of the house of prostitution known to the house as such, having lived in the Johnson House for some time. A. Do you know of any other such person? A. Of my own knowledge I do not know of any such person except that I have seen women whose reputation was known to be bad, go into the Johnson House at all hours of the day.” There was other evidence of similar character and import. In addition to the foregoing there was the positive testimony of the two investigators or detectives of acts of improper relations with a certain woman known as Hazel Howard in said house on August 10 and August 12, 1918. It appears further that said woman had a notorious reputation for immorality in the community and was in conversation with the clerk of the house in front of the desk in the office of said premises when one of said detectives came up and the agreement was made between him and her, in the pres-

ence and hearing of said clerk, to occupy together a room in said house. In fact, the evidence seems as strong and conclusive of the truth of the charge against the house as has appeared in any case of this class that this court has been called upon to consider.

As to the second point, it is sufficient to say that the record contains no evidence that said detectives, or either of them, offered any inducement to or enticed or allured or urged or persuaded in any manner the said Hazel Howard to commit any crime or to go to the Johnson House for any immoral purpose whatever. Moreover, this is not a criminal proceeding, but is a civil action for the purpose of abating a nuisance, and if such inducement had been offered, the evidence would be admissible for the purpose of showing that said Johnson House was at the time in question used for the purposes alleged in said complaint and that the persons in charge of it were allowing such use. In this connection it may be proper to quote from *Corpus Juris*, volume 16, page 88, on the doctrine of entrapments, as follows: "While it has been said that the practice of entrapping persons into crime for the purpose of instituting criminal prosecutions is to be deplored, and while instigation, as distinguished from mere entrapment has often been condemned and has sometimes been held to prevent the act from being criminal or punishable, the general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done at the 'decoy solicitation' of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct." It will be observed that in nearly all of those cases where such evidence has been held inadmissible it has been upon the ground that no crime has been actually committed, as in the case where the owner induces a person to steal his property. In such case there could be no commission of the crime, if the property is taken with the owner's consent, since it is an essential factor of the crime of larceny that it be against the will of the owner. It may be further said that the cases distinguish clearly between measures used to entrap a person into crime and artifice used

to detect persons suspected of being engaged in criminal practices, particularly as such criminal practices vitally affect the public welfare rather than individuals. (*People v. Liphardt*, 105 Mich. 80, [62 N. W. 1022].) This distinction is illustrated in the case of *People v. Hanselman*, 76 Cal. 460, [9 Am. St. Rep. 238, 18 Pac. 425], which was a criminal prosecution for larceny. The complaining witness was a constable, who for the purpose of detecting persons in theft, placed money in his pockets and pretended to be drunk in order to catch someone in the act of taking money from his pocket, and the defendant was caught in this way. It was held that these acts of the complaining witness, by way of inducement, did not amount to a consent to the taking, and were no defense to the criminal charge. [3] The most that could be said in the present instance as to the conduct of said investigators was that they resorted to artifice and strategy and placed themselves in an attitude of willingness to participate in the commission of an immoral and illegal act in order to obtain evidence of the character of said house. Of course, it is to be regretted that it should seem necessary or expedient or proper for reputable citizens to so conduct themselves, but that is not sufficient reason for rejecting their testimony as altogether unworthy of credence. Manifestly in this class of cases it is usually quite difficult to secure evidence of the true character of the house, and, therefore, there is some excuse and justification in the interests of the public welfare, for the questionable method adopted by said investigators.

[4] As to the third point, it is sufficient to say that it was proved that the Johnson House was used for said immoral purposes as late as August 12, 1918, and that there was a course of such conduct up to that time. From this proof the presumption would follow that said condition continued to exist as long as is usual for things or conditions of such nature. (Code Civ. Proc., sec. 1963, subd. 32.) Of course, if there were satisfactory evidence that the condition had changed, it might be said that the presumption was overcome. There was indeed the testimony of the owner of the premises that no immoral acts of the character charged had been committed in the house since said date of August 12, 1918. He even went further and declared that no such acts had ever been committed therein. The lower court, undoubtedly, was

not greatly impressed with the truthfulness of his statements. We cannot say that he was entitled to any more credit than was accorded him by the trial judge. As bearing upon this consideration, we may cite *People v. Dillman*, 37 Cal. App. 415, [174 Pac. 951]; *White v. White*, 82 Cal. 427, [7 L. R. A. 799, 23 Pac. 276]; *Hohenshell v. South Riverside etc. Co.*, 128 Cal. 627, [61 Pac. 371]; *Judge v. Kribs*, 71 Iowa, 183, [32 N. W. 324]; *Halfman v. Spreen*, 75 Iowa, 309, [39 N. W. 512].

We think it must be held that the case was fairly tried and justly decided and that no error whatever appears in the record. The judgment is, therefore, affirmed.

Ellison, P. J., *pro tem.*, and Hart, J., concurred.

[Civ. No. 3073. Second Appellate District, Division One.—October 8, 1919.]

MRS. BERTHA GERNHARDT et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

- [1] **WORKMEN'S COMPENSATION ACT—EMPLOYMENT AS MAID IN SANITARIUM—RIGHT TO BENEFITS OF ACT.**—Under the Workmen's Compensation Act a person employed at a sanitarium as a maid, her duties consisting of what is known as general housework, in addition to which she attends upon patients in the sanitarium, is not engaged in a service falling within the exception of the Workmen's Compensation Act which excludes from the benefits of the act "any employee engaged in household domestic service."
- [2] **ID.—INJURY WHILE PERFORMING OWN WORK—RIGHT TO COMPENSATION.**—Such an employee is not entitled to compensation for injuries received in slipping upon a wet floor on the premises of her employer, where at the time she was engaged only in the performance of work of her own, which was wholly disassociated from any duty having reference to her employment, she not being required to perform any service until one hour later.

1. Occupations or employments within purview of Workmen's Compensation Acts, notes, *Ann. Cas.* 1917D, 4; *L. R. A.* 1916A, 192, 216; *L. R. A.* 1917D, 150.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Chas. P. Huey for Petitioners.

A. E. Graupner for Respondents.

JAMES, J.—*Certiorari*. Petitioners here were the respondents before the Industrial Accident Commission. The commission, upon the application of Mrs. Emma Ottesen, made its order requiring petitioners to make certain payments of money for which they were found liable under the provisions of the Workmen's Compensation and Insurance Act. By this proceeding petitioners seek to have the award annulled on the ground that no legal authority existed under the showing made to support the action of the commission. The respondent, Emma Ottesen, who was employed at a sanitarium which petitioners were conducting, slipped upon a wet floor on the premises of petitioners and fell, sustaining a fracture or sprain, or both, of the left forearm. Mrs. Ottesen was employed as a maid, her duties consisting of what is known as general housework, in addition to which she attended upon patients in the sanitarium. The petitioners lived in the same building and the place answered to a residence for them, as well as a sanitarium for the conduct of the business in which they were engaged.

[1] Answering first one of the objections of the petitioners, we are of the opinion that the service for which Mrs. Ottesen was engaged was not one falling within an exception of the Workmen's Compensation Act, which exception excludes from the benefits of the act "any employee engaged in household domestic service." [2] The most serious objection urged against the award of the commission refers to the question as to whether at the time Mrs. Ottesen received her injury she was engaged in the performance or any duty having reference to her employment. We think, under the undisputed facts shown, it should be concluded that this respondent was at the time engaged only in the performance of work of her own, which was wholly disassociated from any duty that she owed to her employers.

The facts were these: Mrs. Ottesen, having some leisure time allotted to herself, intended to go to her own home for the purpose of washing her own clothes. She intended to take up her abode permanently with petitioners, but had not yet brought her effects to their establishment. She intended to go to her home to do her laundering early in the afternoon. Mrs. Gernhardt, one of the petitioners, suggested to her that she could as well do her laundering at the sanitarium, as there was hot water and materials there available. Mrs. Gernhardt further suggested that on that particular day, as she intended to go downtown, she would be glad to have Mrs. Ottesen at the sanitarium while doing the washing, so that she might answer the door-bell. Mrs. Gernhardt stated to Mrs. Ottesen that she would not go downtown until 4 o'clock, and it also appeared that there was another attendant who would be on duty until that hour. Mrs. Ottesen, however, as she stated in her testimony, concluded that she would return to the sanitarium earlier and so have more uninterrupted time within which to complete her laundry work. She therefore returned at 3 o'clock, one hour in advance of the time she was requested to appear, and was making ready to do her washing. She had not commenced at this when, walking across a kitchen floor which had been scrubbed by another attendant and was still in a wet condition, she slipped and fell, injuring her arm as before stated. Explaining her reason for coming at 3 o'clock instead of 4, she gave the following testimony: "Q. The truth is that you were working on your own material and on your own soiled linen between 3 and 4? A. I hadn't commenced yet. Q. Had you come at 4 o'clock that floor would have been dry, and the accident would not have happened? A. Yes, but I couldn't possibly have done my washing and waited on the patient, and the door-bell and telephone, as Mrs. Gernhardt requested me to do, if I had not come before 4 o'clock, when Miss Spicker was off duty. Q. If you had waited and gone on duty at 4 o'clock this accident would not have happened, would it? A. You don't cross a bridge until you come to it; I had to be there at 4 o'clock, to go on duty." So it appears that the time between 3 and 4 o'clock was wholly at the disposal of Mrs. Ottesen; in other words, it was her own time, during which she was not expected and had not been requested to perform any service

for her employers. We see no difference in the case than were it one where the employee had, during such portions of the day allotted to her for her own purposes, been engaged in performing any act wholly for her own benefit. A different legal situation, we apprehend, would have been presented had 4 o'clock arrived and had Mrs. Ottesen been left in charge of the premises as was designed, even though she might have been occupied for a portion of the time in washing her own clothes. At the time of the accident she was not in the kitchen of her employers upon any business of theirs. Neither does the case fall within those decisions which recognize liability on the part of the employer where the employee is entering the premises of his employers at a seasonable time for the purpose of commencing his labors, or of departing therefrom by the usual way provided. In our opinion the contention made by these petitioners that they incurred no liability by reason of the accident which befell the employee must be sustained.

The findings and award of the respondent Industrial Accident Commission are annulled.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 3077. Second Appellate District, Division One.—October 8, 1919.]

WESTERN INDEMNITY COMPANY (a Corporation),
Petitioner, v. **INDUSTRIAL ACCIDENT COMMISSION** et al., Respondents.

- [1] **INDEMNITY INSURANCE—DEATH OF EMPLOYEE WHILE ENGAGED IN OTHER THAN BUSINESS OF INSURED—NONLIABILITY OF INSURANCE COMPANY.**—Under a policy purporting to furnish insurance covering injuries to employees only while engaged in and about the concern of a certain electrical establishment, the insurance company is not liable in damages for the death of a chauffeur in the employ of the insured, where he was killed while conveying to her home, at the request of the manager of the establishment, a young

1. Injuries covered by employer's indemnity policy, notes, 30 L. R. A. (N. S.) 1192; L. R. A. 1915C, 155.

lady who formerly had been employed by such establishment, such service being purely gratuitous and without any obligation in any wise connected with the business then being transacted by the electrical establishment or in connection therewith.

PROCEEDING in *Certiorari* to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Duke Stone for Petitioner.

A. E. Graupner and Swanwick & Donnelly for Respondents.

JAMES, J.—*Certiorari* to review proceedings and an award made by the Industrial Accident Commission.

The applicants before the commission were the father and mother of Byron J. Millard, who was accidentally killed while operating an automobile belonging to P. R. Kennedy. Kennedy was conducting at Long Beach, in the county of Los Angeles, an electrical business. The business was, at the time material here, being directly managed by the son of Kennedy. When he met with the accident which caused his death, young Millard was engaged in conveying to her home a friend of the Kennedy's from a point in the city of Long Beach. He was performing this service at the direction of the younger Kennedy. Petitioner here was the insurance carrier which had agreed by its contract to respond to any damage which might accrue on account of injuries or death resulting therefrom suffered by any employee of the assured "in and during the course of and arising out of the operation of the trade, business or work described." In the schedule of statements which formed a part of the contract of insurance the business so covered was described as "Electrical Store—retail or combined wholesale and retail; Electrical Equipment—installation and repairs within buildings and on buildings incidental to such inside work, including the making of service connections for such work, excluding the installation of equipment in power plants." The contract was made to cover the various enumerated classes of employees, including "chauffeurs and helpers." Rodger Kennedy, the son of the assured, testified that on the day of the accident young Millard was at the electrical store in Long Beach and under his (Kennedy's) direction; that a

Miss Blevins had at a prior time worked as bookkeeper in the electrical store and that she had left Kennedy's employ about a month and a half previous and gone to work for an oil company; that, learning that Miss Blevins was ill at her place of employment, young Kennedy instructed the chauffeur, Millard, to go and get her and take her to her home or her mother's home, whichever she desired; that while performing this service Millard was killed. [1] The service which Kennedy required young Millard to perform in transporting Miss Blevins to her home was, so far as appears, as between Kennedy and the lady, purely gratuitous and without any obligation in any wise connected with the business then being transacted at the electrical store or in connection therewith. Under this state of facts, petitioner argues that its policy of insurance did not cover the case and that it should not be made to respond in the damages assessed against it. In this conclusion we must concur. The contract of insurance does not purport in any of its terms to cover injuries suffered to a chauffeur of the Kennedys irrespective of the duty which such chauffeur might be performing at the time he suffered injuries. The policy quite clearly related to the business being transacted in and about and in connection with the electrical establishment maintained by the Kennedys at Long Beach. Counsel for petitioner well argues that if the award of the commission in this case is allowed to stand, then the insurance carrier might be held liable for any injury whatsoever occurring to a chauffeur employed by the Kennedys, regardless of the nature of it, so long as such injury was suffered while such chauffeur was operating an automobile under the direction of his employers. This notwithstanding that the policy, as has been before mentioned, purported to furnish insurance covering injuries to employees while engaged in and about the concern of the electrical establishment. That the employer of Millard would be liable, there would seem to be no question; that an insurance carrier whose policy relates to injuries suffered by employees while engaged in a particular and specified business would not be so liable, we think is just as clear.

The findings and award as against this petitioner are annulled.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2922. First Appellate District, Division One.—October 9, 1919.]

CALLIE STONE, Appellant, v. GEORGE W. McWILLIAMS, Respondent.

- [1] **DEFAULT—RELIEF FROM—DISCRETION—APPEAL.**—Applications to be relieved from an order or judgment by default are addressed to the sound discretion of the trial court, and its action upon such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion.
- [2] **ID.—CASE AT BAR—DISCRETION NOT ABUSED.**—In this action the court did not abuse its discretion in setting aside the defendant's default where he made a seasonable application to be relieved from his default and filed an affidavit of merits showing a good defense, it appearing that he was over seventy years of age, totally blind, illiterate and unable to write his name, and wholly unfamiliar with court proceedings, and that he neglected to make seasonable answer to the complaint by reason of what he understood the deputy sheriff to advise or inform him he might safely do at the time that officer made service.

APPEAL from a judgment of the Superior Court of Fresno County. M. F. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Stanley Moffatt for Appellant.

Burns & Watkins and E. S. Reichard for Respondent.

KERRIGAN, J.—This is an appeal from an order setting aside a default and vacating the judgment entered thereon in favor of plaintiff.

The default was taken in an action commenced by the plaintiff against the defendant to recover the sum of one thousand dollars for breach of contract. The complaint alleged that the parties entered into an agreement by the terms of which the plaintiff was to make her home with the defendant, keep house for him and give him such care and attention necessary for the comfort of a man of his age and condition during the remainder of his life, in return for which she was to receive board and lodging for herself and two minor children, with the further advantage that the defendant

would by last will and testament leave to plaintiff whatever property he might own at the time of his death. It further appears that the plaintiff entered upon the performance of this agreement, and remained at the home of defendant for about one year, when, after a quarrel with him, she left, and shortly thereafter commenced this action. The summons and complaint were served upon defendant by a deputy sheriff, and defendant making no answer thereto, plaintiff caused his default to be entered, upon which the court rendered judgment in plaintiff's favor for one thousand dollars, the amount demanded. Within a reasonable time under the attending circumstances defendant moved the court to set aside his default and to vacate the judgment upon the ground of his mistake, inadvertence, and excusable neglect. The court granted the motion, imposing terms under which the defendant was required to pay into court for the use of plaintiff the sum of fifty dollars.

From the record it appears that the defendant is over seventy years of age, totally blind, illiterate and unable to write his name. Upon the motion to set aside the default he made and filed an affidavit which stated, among other matters, that at the time the summons and complaint were served upon him he was wholly unfamiliar with court proceedings, and neglected to make seasonable answer to the complaint by reason of what he understood the deputy sheriff to advise him or inform him he might safely do at the time that officer made such service, his advice or information being to the effect that under the circumstances of the case it would be needless for the defendant to do anything, either in the way of writing a letter to the plaintiff or her attorney or otherwise, and that no trouble would ensue from such inactivity. On the other hand, it is stated in the counter-affidavit filed by the plaintiff in opposition to the motion that shortly before the commencement of the action the defendant withdrew his money from a bank and transferred his real estate, with the intention apparently of protecting himself from any claim plaintiff might make or prosecute, but the steps he took in this behalf are the subject matter of another action instituted by plaintiff; and whatever his object may have been, he seems to have believed that he was acting within his legal rights. In any event we do not think this circumstance would warrant us in holding that the court abused

its discretion in setting aside the defendant's default. [1] It is invariably held that applications to be relieved from an order or judgment by default are addressed to the sound legal discretion of the trial court, and that its action upon such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion (*Nicoll v. Weldon*, 130 Cal. 667, [63 Pac. 63]). In the case of *Berri v. Rogero*, 168 Cal. 736, [145 Pac. 95], which, upon the facts, was less favorable to the party appealing from the order vacating the default than the present case, the court said: "The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence or neglect of his adversary."

[2] Here the defendant made a seasonable application to be relieved from his default and filed an affidavit of merits showing a good defense. His age, blindness, and illiteracy might well have appealed to the court to exercise its discretion in his favor even more liberally than in ordinary cases. It does not appear that the plaintiff has suffered any prejudice or that any injustice will result to her from a trial of the case upon the merits. Under these circumstances we are not inclined to hold that the court abused its discretion in granting defendant's application.

The order is affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2321. Second Appellate District, Division One.—October 9, 1919.]

T. M. TELANDER, Respondent, v. TUJUNGA WATER & POWER COMPANY (a Corporation), Appellant.

[1] **CONTRACTS—AGREEMENT TO FURNISH WATER—BREACH—ACTION FOR DAMAGES—ALTERATIONS IN INSTRUMENT—EVIDENCE.**—In an action for damages for breach of a contract to furnish water for irrigation and domestic use upon a certain tract of land, an objection to the introduction in evidence of the contract, based upon the fact that certain printed matter therein had been stricken out, is with-

out merit where there is nothing to indicate that the erasures of the printed lines were made after the execution of the instrument, where the parts stricken out are not material to the question in dispute, and it appears that the striking out of the matter was to make the contract comply with the terms of a preliminary contract entered into between the parties.

- [2] **ID.—ERROR IN DEED—WAIVER OF OBJECTION.**—In such action, an objection to the admission in evidence of the deed to plaintiff based on the fact that the contract for the water right was made by the "Tujunga Company" to plaintiff's predecessor, whereas the deed in question refers to a water right deeded to plaintiff's predecessor by the "Tujunga Water Company," cannot be urged for the first time on appeal.
- [3] **ID.—SALE OF WATER SYSTEM—ASSUMPTION OF GRANTOR'S OBLIGATIONS.**—Where a water company acquires the water rights, irrigation plant, and system of another company, with full knowledge of a contract by which the latter company was bound to render certain water service, it takes the same impressed with the obligation to render such service, notwithstanding there is no express covenant in the grant as to the assumption of the obligation of the grantor.
- [4] **ID.—FAILURE TO FURNISH WATER—LOSS OF CROP—MEASURE OF DAMAGE—EVIDENCE.**—While the true measure of damage for loss of crops, due to a breach of contract for furnishing water, is to determine the probable yield and market value of the crop, and deduct therefrom the cost of producing and marketing the same, where the plaintiff introduces evidence as to the value of the crop in the field, and there is no further showing as to the cost necessary to handle such crop, the court is justified in accepting plaintiff's figures as tending to establish the amount of damage sustained.
- [5] **ID.—SHORTAGE OF RAINFALL—DISREGARD OF PREFERENTIAL RIGHTS OF PLAINTIFF—EVIDENCE.**—In an action for damages for breach of a contract to furnish water for irrigation and domestic purposes, the court is justified in ignoring the testimony of defendant's witness that a shortage of rainfall was the cause of the company's failure to supply water to plaintiff where the testimony further shows that during the months when the company failed to furnish any water to plaintiff it was supplying water to other lands and to other parties for irrigation, domestic use, and other purposes contrary to the provisions of the contract under which plaintiff was entitled to water.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

4. Measure of damages for breach of contract to furnish water for irrigation, notes, 19 L. R. A. (N. S.) 938; 81 L. R. A. (N. S.) 743.

The facts are stated in the opinion of the court.

F. E. Davis for Appellant.

John Beardsley and A. B. Shaw, Jr., for Respondent.

SHAW, J.—In this action plaintiff sought to recover from defendant damages in the sum of \$1,025, alleged to have been sustained on account of defendant's breach of a contract, whereby it is alleged it was obligated to furnish him a supply of water for irrigation and domestic use upon a certain tract of land. The appeal is by defendant from a judgment in favor of plaintiff.

As appears from the record, the material facts are: That a corporation known as Tujunga Company was the owner of a tract of land designated as Hansen Heights, for the irrigation of which, by means of pipe-lines and a water system constructed by it, it claimed the right to divert the waters of the Tujunga River. As such owner of said tract of land and the waters of the Tujunga River, it, about February 1, 1910, sold and conveyed to one H. H. Miller lots 23 and 34 of said tract, and at the same time executed a contract to the grantee of said lots whereby it agreed to sell and deliver to the purchaser thereof a supply of water for irrigation and domestic use thereon, which deed of conveyance and contract were duly recorded; that about October 30, 1910, Miller conveyed said lots 23 and 34 of Hansen Heights, together with all water rights conveyed to him by the Tujunga Company, to the plaintiff herein, and thereafter, to wit, on or about March 9, 1911, the Tujunga Company, by a deed duly executed and recorded, conveyed to the defendant herein, the Tujunga Water & Power Company, all of its water rights, pipe-lines, conduits, and irrigation system so constructed by it for the diversion and conveying of water for the irrigation of the lands in the tract known as Hansen Heights, and through and by means of which said grantor had theretofore been supplying water to said plaintiff and his predecessor in interest for use upon said lands; that pursuant to said conveyance defendant took possession of said water system and delivered a supply of water to plaintiff for use upon said lots 23 and 34 up to the summer of 1912, when, during the summer of said year and the summer of 1913, it refused to

deliver any water to plaintiff; that by reason of its failure so to do plaintiff was deprived of the use of water for irrigation and domestic use, as a result of which his crops were damaged and he was compelled to obtain from other sources a supply of water for domestic use.

For the purpose of showing that plaintiff had succeeded to the ownership of the water right described in the contract made by the Tujunga Company with Miller, a deed from the latter to plaintiff, conveying said land and describing the water right thereby conveyed as that deeded to the property (lots 23 and 34, Hansen Heights), by the "*Tujunga Water Company*," was received in evidence over defendant's objection that it was incompetent, irrelevant, and immaterial. [1] This ruling was followed by another of which defendant complains, admitting in evidence the contract made by the "*Tujunga Company*" to furnish a supply of water to Miller for use upon the lots. The objection to the competency of the contract as evidence was based upon the fact that certain printed matter therein had been stricken out, and it is now claimed that under the provisions of section 1982 of the Code of Civil Procedure, it should not have been admitted in evidence. This section provides that "the party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration"; otherwise the writing cannot be received in evidence. There is no merit in the contention, for several reasons: First, there was nothing to indicate that the erasures of the printed lines were made after execution of the instrument; second, the parts stricken out were not material to the question in dispute, namely, the conveyance of the water right; and, third, it did appear that the striking out of the matter was to make the contract comply with the terms of a preliminary contract entered into between the parties. [2] The objection now urged for the first time to the deed from Miller to plaintiff is based upon the fact that the contract for the water right was made by the Tujunga Company to Miller, whereas the deed refers to a water right deeded to plaintiff's grantor by the Tujunga *Water Company*. That in referring to the maker of the contract as the Tujunga *Water Company*, instead of the Tujunga Company, was a mistake of the scrivener in drawing the deed is apparent, and

the failure to explain the error was no doubt due to the fact that defendant at the time raised no objection based thereon. Under these circumstances, where the real ground of objection was not pointed out, appellant should not for the first time in this court be heard to complain thereof.

[3] The Tujunga Company, as shown by the evidence, was originally the owner of both the land and water rights, both of which, by a proper deed, it conveyed to Miller. Plaintiff by the deed from Miller succeeded to his rights, and, in the absence of any transfer by the Tujunga Company, he, as owner of the land and water right, would be entitled to the service which the company had contracted to render to Miller. The defendant herein, in acquiring from the Tujunga Company the water rights, irrigation plant, and system of the Tujunga Company, took the same impressed with its obligation to furnish water to Miller and his grantee, as to which obligation of its grantor it had full knowledge of the contract theretofore made, and, notwithstanding the fact that there was no express provision in the grant as to the assumption of the grantor's obligation to deliver water, it was bound thereby. In 40 Cyc., page 835, it is said that "a purchaser of the ditch or canal with knowledge of such a previous grant [as here made] will be bound by the grantor's covenants." (See, also, *Hunt v. Jones*, 149 Cal. 297, [86 Pac. 686]; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, [65 Pac. 44].) In 40 Cyc., page 749, it is said: "A corporation, whether private or public, purchasing water rights, ditches, and a canal system, takes subject to the duties and burdens of which it has notice. The rights of the grantee are generally available against all successors in the title of the grantor, except it may be *bona fide* purchasers without notice." It would be a monstrous proposition to hold, as contended for by appellant, that, after its grantor had sold the entire tract of land, including lots 23 and 34, and conveyed therewith "water rights," together with an agreement to deliver a stipulated amount of water by means of a system of dams, reservoirs, pipe-lines, and conduits constructed for the purpose of rendering such service, it might sell its water system to another company which, in the absence of express covenants to assume such obligations, would take it stripped and freed of all rights and obligations of its predecessor in interest, and thus use the plant in the perpetration of a like fraud.

The evidence introduced as to the damage sustained by plaintiff is meager and unsatisfactory. [4] As claimed by appellant, the true measure of damage for loss of crops, due to a breach of contract for furnishing water, is to determine the probable yield and market value of the crop, and deduct therefrom the cost of producing and marketing the same. (*Teller v. Bay & River Dredging Co.*, 151 Cal. 209, [12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942].) In the case at bar plaintiff's evidence shows the loss of crops, to wit, alfalfa hay, and that the value of this hay in a loose state in the field was \$15 per ton. Assuming that some expense would have been incurred in producing the hay and cutting it, it was defendant's duty to have produced, either independently or upon cross-examination, evidence bearing thereon. In the absence of so doing, the court acted upon the only evidence before it, and, since it appeared that loose hay in the field which would have been produced was of the value of \$15 per ton, the court, in the absence of any further showing, was justified in accepting it as tending to establish the amount of damage sustained.

And likewise as to the complaint made upon the damage sustained by plaintiff for failure to obtain water for domestic use. His testimony tended to show that the damage due to the loss of water for such purpose was five hundred dollars. It cannot be said that such evidence was insufficient to justify the award of \$75 on account of the damage thus sustained.

[5] The water contract whereby the Tujunga Company agreed to furnish Miller with water contained a provision as follows: "Nothing herein contained shall be construed as binding the seller to furnish said water if prevented by earthquake or other natural causes beyond its control." While defendant did not allege that its breach of the contract was due to earthquake or natural causes beyond its control, it did produce Dr. Hansen, the manager of the company, who as a witness testified that the cause of the failure to furnish water to plaintiff was drought and lack of rainfall; but it further appeared from the testimony of this witness that during the months when the company failed to furnish any water to plaintiff it was supplying water to other lands and to other parties for irrigation, domestic use and other purposes, contrary to the provisions of the contract under which plain-

tiff was entitled to water. In other words, its duty to plaintiff took precedence over other parties, whose rights under the contract to water were only when there was a surplus and after plaintiff had received his supply of water. Under these circumstances the court was justified in ignoring the testimony of Dr. Hansen that a shortage of rainfall was the cause of the company's failure to supply water to plaintiff.

There are other alleged errors, the only reference to which in appellant's brief is by number as designated in the transcript as exceptions, and which counsel for appellant asserts are well founded. Since not deemed worthy of argument, we feel justified in concluding they are without merit.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2886. First Appellate District, Division Two.—October 10, 1919.]

DANTE NANNIZZI et al., Appellants, v. NATALE CAPRILE et al., Respondents.

- [1] **CORPORATIONS—STOCK SUBSCRIPTIONS—NECESSITY FOR PERMIT.**—Under the Investment Companies Act, prior to the permit from the commissioner of corporations no valid subscription for the corporate stock can be made; and regardless of any attempt on the part of the incorporators to subscribe for stock in excess of the original qualifying shares, there can be no subscription for stock of the corporation.
- [2] **Id.—DISSOLUTION OF PARTNERSHIP—MERGER INTO CORPORATION—ISSUANCE OF PERMIT BY CORPORATION COMMISSIONER—VALIDITY OF AGREEMENT BETWEEN PARTNERS.**—An agreement between partners that the partnership should be dissolved and its property merged with that of other partnerships engaged in the same line of business, in a consolidation under a corporation to be formed, and that the partners should receive respectively stock in the corporation at par, equivalent to their respective interests in the partnership, the members of each partnership as a group to receive such stock of equivalent value to the respective partnership contributions of property to the corporation assets, is a promoters' agreement, binding upon them and good as an offer to the corporation, to become binding on the corporation upon its lawful acceptance of

its benefits; and the fact that the commissioner of corporations might never grant his permission to the issuance of the corporate stock has no effect upon the validity of the partnership agreement for dissolution.

[3] CONTRACTS—SUBSEQUENT INABILITY OF PERFORMANCE—EFFECT OF.—

A contract valid in its inception may become voidable or impossible of performance by the failure of a subsequent contingency, but if the contingency is one which may happen, the parties are bound by their contract until it can be determined it cannot be enforced.

[4] PARTNERSHIP—AGREEMENT FOR DISSOLUTION—BINDING EFFECT OF.

In a suit to decree the dissolution of a partnership, in the absence of its inherent invalidity or facts which might enable one of the contracting parties to rescind it, the court cannot disregard the agreement for dissolution, but by its decree must enforce it; and in such a suit none of the partners can have the benefit of the agreement for dissolution and evade those of its provisions by which their respective rights in the partnership assets are determined.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edmund P. Mogan, Judge. Affirmed.

The facts are stated in the opinion of the court.

James M. Thomas for Appellants.

I. F. Chapman for Respondents.

BRITTAIN, J.—In a suit for partnership accounting, dissolution, sale, and distribution of the assets, it was adjudged there had been full accounting and dissolution. The appellants are satisfied with that portion of the judgment. Upon findings, supported by evidence, that the plaintiff partners had agreed with the defendant partners that the partnership should be dissolved and its property merged with that of other partnerships engaged in the same line of business, in a consolidation under a corporation to be formed, and that the partners should receive respectively stock in the corporation at par, equivalent to their respective interests in the partnership, the members of each partnership as a group

3. Effect of intervening impossibility to perform contract, notes, 14 L. R. A. 215; L. R. A. 1916F, 10.

to receive such stock of equivalent value to the respective partnership contributions of property to the corporation assets, and the further finding, that application had been made in good faith to the commissioner of corporations for permission to issue the stock in accordance with this agreement, though the permit had not been granted at the time of the judgment, the court determined that if the permit should be granted the appellants would be entitled to their respective portions of the corporation stock. This part of the judgment only is attacked by the plaintiffs on this appeal.

[1] On behalf of the appellants it is argued that, under the Investment Companies Act, prior to the permit from the commissioner of corporations no valid subscription for the corporate stock can be made. This is true. It follows that, regardless of any attempt on the part of the incorporators to subscribe for stock in excess of the original qualifying shares, there was no subscription for stock of the corporation. [2] The agreement between the various partnerships was a valid one. It was a promoters' agreement, binding upon them and good as an offer to the corporation, to become binding on the corporation upon its lawful acceptance of its benefits. (*Scadder Flat G. M. Co. v. Scadden*, 121 Cal. 33, [53 Pac. 440]; *Garretson v. Pacific etc. Co.*, 146 Cal. 184, [79 Pac. 838].) The agreement of the partners for dissolution and for the transmutation and distribution of its assets was also valid. The fact that the commissioner of corporations might never grant his permission to the issuance of the corporate stock had no more effect upon the validity of the partnership agreement for dissolution than would the subsequent failure of the other promoters to organize the corporation. [3] A contract valid in its inception may become voidable or impossible of performance by the failure of a subsequent contingency, but if the contingency is one which may happen, the parties are bound by their contract until it can be determined it cannot be enforced. There are many familiar applications of this rule, one of the most common being where parties contract for a sale of real estate, contingent upon an attorney's approval of title. Such a contract is enforceable by either party until it is shown that the attorney will not or cannot approve title. Neither party may evade the obligations of the contract merely by showing that the attorney may refuse to approve the title. No showing of im-

possibility is made in this case, nor is there any showing which would have justified the court in this suit in disregarding the agreement of the partners concerning what they should have in lieu of their respective partnership interests.

The portion of the judgment appealed from simply determines that the plaintiffs shall receive stock in the corporation if the commissioner of corporations issues his permit. This was exactly what the appellants agreed they should have. It is contended that the judgment is informal in that it fails to determine what the appellants shall have in the event the commissioner of corporations shall refuse to issue the permit. There is no question in regard to the validity of the organization of the corporation. It cannot be presumed that the incorporators have been guilty of an overvaluation of the partnership assets transferred to the corporation, or of a violation of the law in any other respect. If they have obeyed the law, they will be entitled to the permit from the commissioner of corporations, and in that event the appellants will receive under the judgment what they agreed with their partners they should receive. [4] Under these circumstances the judgment, while informal, may be sustained upon either of two theories; first, that in a suit to decree the dissolution of a partnership, in the absence of its inherent invalidity or facts which might enable one of the contracting partners to rescind it, the court cannot disregard the agreement for dissolution, but by its decree must enforce it; and, secondly, that in such a suit none of the partners can have the benefit of the agreement for dissolution and evade those of its provisions by which their respective rights in the partnership assets are determined. If this decree in a suit in equity shall become impossible of enforcement by reason of the refusal of the commissioner of corporations to permit the carrying into effect the original agreement of the parties, there is no reason why their respective rights as they then exist may not be determined, but until it shall be made to appear that the appellants have been injured by the judgment from which the appeal is taken, it will not be reversed. On this appeal, since the judgment simply bound them to their prior agreement, in contemplation of law, they cannot be aggrieved by it.

The judgment is affirmed.

Nourse, J., and Langdon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 9, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 8020. First Appellate District, Division One.—October 10, 1919.]

**BASANTA C. BONNARJEE et al., Respondents, v.
GEORGE W. PIKE et al., Appellants.**

- [1] **VENDOR AND VENDEE—EXCHANGE OF PROPERTIES—STATUS OF AGENT—EVIDENCE—FINDING.**—In this action for damages resulting from an exchange of properties by the respective parties, brought about by the aid of false representations on the part of the agent who negotiated the transaction, the trial court was justified in holding that such agent was the agent both of the plaintiffs and the defendants.
- [2] **ID.—VALUE OF PROPERTY—EVIDENCE.**—A *bona fide* rent paid for the use of property or the price actually paid therefor at a *bona fide* sale may be proved as an aid in determining its value.
- [3] **ID.—REPRESENTATION AS TO VALUE—STATEMENT OF FACT—WHEN ACTIONABLE.**—A representation as to the value of property is often a representation of fact, and actionable if false, especially where the vendee to whom the representation is made is so situated as to have no means of investigating the question for himself, and, therefore, relies on the statements of value made by the vendor or his agent.
- [4] **ID.—REPRESENTATION BY AGENT—LIABILITY OF PRINCIPAL.**—When such a representation is made by an agent in the transaction of his principal's business, the latter, accepting the benefit of the transaction, is liable in damages for the agent's wrongful act.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

3. False statement as to cost, selling or market price of property, or as to offers therefor as fraud, notes, 8 Ann. Cas. 1062; 35 L. E. A. (N. S.) 175; L. E. A. 1916F, 782.

The facts are stated in the opinion of the court.

Henry K. Norton and Wilbur Bassett for Appellants.

John F. Poole and Valentine & Newby for Respondents.

KERRIGAN, J.—This action was brought by the plaintiffs, who are husband and wife, to recover from the defendants, also husband and wife, the sum of three thousand dollars as damages resulting from an exchange of properties by the respective parties, brought about by the aid of false representations on the part of the agent who negotiated the transaction. Judgment went for plaintiffs in the sum demanded, and the defendants appeal.

The appellants make several contentions in support of their appeal, among them being that the evidence is insufficient to show that the agent in the transaction was in fact the defendants' agent; that it is also insufficient to show the values of the respective properties upon the difference in which the court based the amount of damages allowed; and furthermore, that the appellants are not responsible for the fraudulent representations of the agent, even conceding that he acted for them.

The facts are substantially these: Basanta C. Bonnarjee (hereinafter referred to as the plaintiff), a native of India and a convert to the Christian religion, was living with his wife in Chicago, and there owned a brick building. Desiring by reason of his wife's illness to go to Los Angeles and there reside, he sought the services of one Wendell, a real estate broker, and a member of a church which the plaintiff sometimes attended. Stating his desire to Wendell, the latter immediately informed him, "I know a person over there [Southern California] and he wanted me to exchange his property, and he wants to come here and we all want him to come. He is a good man and belongs to our church. He is a Sunday-school superintendent, a sanctified man, and I will write him and see if he has the property still left and will exchange that with you." Wendell accordingly wrote to the defendants, with whom he had a previous acquaintanceship, having visited them at their home in Los Angeles. They also were members of a church of the same or an allied denomination, and Wendell addressed them as "Dear brother

and sister," and in signing his letters seldom omitted an allusion to the founder of the Christian religion. This also was the practice of the defendant George W. Pike, who, in his correspondence both with Wendell and the plaintiff, also invariably preceded his signature with the words "Your brother in Christ." In his first letter to Pike, Wendell gave full particulars of the plaintiffs' property, including the price, which was put at five thousand five hundred dollars, and stated that they would trade with the defendants for their cottage "if the price was right." The correspondence which ensued resulted in an exchange of properties, the plaintiffs transferring to the defendants their said house at a valuation of five thousand five hundred dollars, subject to a mortgage of one thousand five hundred dollars, and receiving from the defendants their cottage at a valuation of four thousand five hundred dollars, subject to a mortgage of one thousand three hundred dollars; and a vacant lot, situate on a hillside, over a mile from transportation facilities, barren of street improvements of any kind, and the taxes on which were five dollars per annum, at a valuation of two thousand five hundred dollars, and subject to a mortgage of one thousand dollars; the agreement of exchange also provided that the plaintiffs should pay to Wendell, not only a commission on their own account, but also one agreed to be due to him from the defendants upon this transaction.

There was testimony in the case from which the court was justified in finding that the value of the plaintiffs' property was the figure at which it was put in the transaction. This was the price paid for it by the plaintiffs, and it was rented for forty dollars per month, one of the conditions of the lease being that the tenant should make all repairs; and, according to the testimony of the plaintiff, could have been rented for more. He testified that he could easily have rented it for fifty dollars per month, but having a good tenant, whom he described as a prompt payer, he accepted the lower rent. As to the defendants' property, it was testified to that the cottage was worth from two thousand dollars to two thousand five hundred dollars, only, and was subject to a mortgage of one thousand three hundred dollars, which would make their equity therein of the value of from seven hundred dollars to one thousand two hundred dollars; that the vacant lot was worth, one witness testified, four hundred

dollars, and another five hundred dollars. Burdened as it was with a mortgage of one thousand dollars, secured directly by the defendants from an old lady (whether a member of their church does not appear), the equity therein would have no value.

During the negotiations the plaintiff expressed grave concern to Wendell that the defendants' property was not of the value at which the trade was sought to be made. Wendell quieted him by saying, "Don't you worry about that. I told you that Brother Pike is a good man and he will never do anything at all that is wrong . . . and now here is an opportunity for you, and you are getting a bargain. . . . On the price which you are getting I tell you it is a bargain. I was there, and I have seen the property; both of these properties I have seen, and I can assure you they are worth just what Brother Pike wants for it, and he would not misrepresent at all, so you can take his word for it, and when you go there you will find that you are not at all anyway loser but you get a bargain." The plaintiff's wife was equally dubious about the value of the defendants' property, but her fears were also overcome by similar assurances from Wendell. He said, "Sister Bonnarjee, don't worry anything at all. I am doing the best I can for you, and when you go there you will see that you have made a bargain. Brother Pike is a good man; he belongs to our church, so you can take his word for it, and you will see when you go that it will be all right. You are getting a bargain."

[1] We think the trial court was fully justified in holding that Wendell was the agent both of the plaintiffs and the defendants. Bearing on the question of his employment is the direction contained in one of Pike's letters to Wendell: "If I can trade in both places I would say you can see what you can do." Clearly, in seeing what he could do he was acting for defendants. In addition to the fact that the defendants recognized their liability to pay Wendell a commission upon the transaction (for which, of course, they were not liable unless he was their agent), the evidence also shows that by their direction he received and receipted for money due them incidentally from this same transaction, gave to the plaintiff instructions as to the form of the deed to be executed by him and his wife, recorded it, and that during

the course of the same negotiation was intrusted by defendants with a third piece of property for disposal.

[2] The evidence as to value sufficiently supported the court's finding thereon. "A *bona fide* rent paid for the use of property may generally be shown as an aid in establishing its value." (13 Ency. of Evidence, 435.) "In several jurisdictions the price actually paid at a *bona fide* sale of the property the value of which is in dispute, about the time the transaction arose, may be proved as an aid in determining its value" (Id., p. 447).

[3] That a representation as to the value of property is often a representation of fact, and actionable if false, is well established, especially where the vendee to whom the representation is made is so situated as to have no means of investigating the question for himself, and, therefore, relies on the statements of value made by the vendor or his agent. (*Crandall v. Parks*, 152 Cal. 772, [93 Pac. 1018]; *Phelps v. Grady*, 168 Cal. 73, 77, [141 Pac. 926].) [4] It is equally well settled that when such a representation is made by an agent in the transaction of his principal's business the latter, accepting the benefit of the transaction, is liable in damages for the agent's wrongful act. (Civ. Code, sec. 2330; *Riser v. Walton*, 78 Cal. 490, [21 Pac. 362].)

We conclude from the foregoing that the court's findings are sufficiently supported by the evidence, and that the judgment entered in plaintiff's favor was the correct legal conclusion therefrom.

The judgment is affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2024. Third Appellate District.—October 10, 1919.]

C. D. McCOMISH, Appellant, v. C. C. KAUFMAN,
Respondent.

- [1] **LANDLORD AND TENANT—EXPIRATION OF TERM—RIGHT OF LANDLORD TO FIXTURES NOT REMOVED—WAIVER.**—The right of a landlord to claim fixtures put in the leased building by the tenant but not removed during the term of the original lease may be waived and the tenant by contract granted the right to remove the fixtures during the term of the new lease.
- [2] **ID.—EXTENSION OF TIME FOR REMOVAL—EVIDENCE—FINDING.**—In this action to recover possession of certain property alleged to have been wrongfully removed by the tenant after the expiration of the time within which such removal might legally have been effected, the testimony of the defendant covering his conversations and dealings with the plaintiff, though denied in part by the latter, was sufficient to support the finding of the trial court that plaintiff agreed that defendant should have thirty days in addition to the time given by his prior lease and notice within which he might remove the property, and that defendant did remove the property prior to the agreed date.
- [3] **ID.—ADMISSIBILITY OF PAROL EVIDENCE—WAIVER OF OBJECTION.**—Where in such action the defendant was permitted, without objection from the plaintiff, to offer parol evidence in support of his claim that the plaintiff by oral agreement extended the time within which the property might be removed from the leased premises, the written lease covering the further term having contained no such provision, the admissibility of such testimony cannot be questioned for the first time on appeal.

APPEAL from a judgment of the Superior court of Colusa County. Wm. M. Finch, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Ralph C. McComish and Alva A. King for Appellant.

Millington & Millington for Respondent.

ELLISON, P. J., pro tem.—Plaintiff brought this action to recover possession of 235 opera-chairs, a lot of scenery, stage

1. New lease as affecting right to remove fixtures, notes, 3 Ann. Cas. 331; 20 Ann. Cas. 769.

fixtures, and an electric sign. From a judgment in favor of defendant the plaintiff appeals.

On the twelfth day of March, 1912, the plaintiff gave to the defendant a lease of a room in a building in the town of Colusa, known as the "Herald Building," to be used for the purpose of moving-picture entertainments. At the time the lease was executed, the defendant was in possession of the premises and had been for some time under prior contract with plaintiff. The lease was for a term ending December 31, 1913, with the option to the defendant of a two years' extension. The rental was thirty-five dollars per month. At the date of the lease there was certain personal property in the room consisting of chairs, scenery, and other articles used in the moving-picture business, which concededly belonged to the defendant. The lease stated that this furniture and fixtures were pledged to the plaintiff for the faithful performance of the conditions of the lease. Defendant exercised his option and held under this lease until December 31st, 1915. Thereafter he held the premises and conducted the moving-picture business in said room as a tenant at will or from month to month without any written lease until August 5, 1918, at which time plaintiff served upon him a written notice to vacate within thirty days.

Upon receiving said notice, defendant had an interview with plaintiff and informed him that thirty days was too short a time within which to move his fixtures and furniture and asked for a new lease for a longer term than thirty days, and stipulated that if such additional time were given, he would pay an increased rental, and remove all his property, including the property here involved, before the expiration of such new lease. As a result of this interview the plaintiff gave to the defendant a new lease of the premises. This lease was dated August 12, 1918. The property leased was described as "that room known as the 'Gem Theater' located in the Herald Building, in the town of Colusa." The term was for one month beginning the first day of September, 1918, and ending the thirtieth day of September, 1918. The rental for the month was sixty dollars. No mention was made in the lease of the fixtures or furniture. Within the life of the new lease the defendant removed from the building all the property, the subject of this litigation.

The appellant's position may be fairly stated as follows: When the lease of August 12, 1918, was executed, the fixtures, which had been put in the building during the existence of a prior lease and not removed before its expiration, had become the property of the plaintiff, and the new lease, not providing for their removal by the tenant, he had no right to take them from the building. In support of his position, he quotes from *Wadman v. Burke*, 147 Cal. 354, [3 Ann. Cas. 330, 1 L. R. A. (N. S.) 1192, 81 Pac. 1013], as follows: "And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate, and the fixtures annexed, which have become part of it."

The decisions present some apparent conflict upon the matter set forth above.

Thus, it was held in *Woods v. Bank of Hayward*, 10 Cal. App. 93, [106 Pac. 730], that a holding over from month to month after the expiration of a written lease amounted to a continuance of the original holding and that the tenant's right of removal was not lost. A petition for hearing by the supreme court was denied.

[1] Conceding, for the purposes of the argument only, that the law is as claimed by appellant, still after the original term has expired, the plaintiff could waive the right claimed and could by contract grant to his tenant the right to remove the fixtures during the new term which expired September 30, 1918, and if he did so, the removal by defendant would be a legal act.

"Anyone may waive the advantage of a law intended solely for his benefit." (Civ. Code, sec. 3513.)

[2] In finding IX is this language: "Plaintiff did make, execute, and deliver to defendant his certain agreement in writing whereby he did let and lease to the defendant that room known as the 'Gem Theater' located in the Herald Building upon the thirty-first day of September, 1918 (?) (twelfth day of August [?]) at an increased rental and plaintiff then and there expressly agreed that defendant

should have thirty days in addition to the time given by said prior lease and notice during which defendant could and should remove all property from the room occupied by the defendant and known as the 'Gem Theater' and said defendant so agreed to remove said property before September 31, 1918, and said defendant so agreed and did pay said increased rental and prior to September 31, 1918, did remove said property."

This finding, in connection with the others, is sufficient to support the judgment, and if it is to stand, the judgment must be affirmed. Counsel for appellant attacks it upon the ground that it is not supported by the evidence. The evidence in the record amply sustains the finding.

The defendant testified: "I told Mr. McComish when he handed me this notice, 'Isn't that rather short time for me to move out? Isn't that rather short notice for me to get the things moved out? This is a mighty short time to move all of this furniture and fixtures and get everything out immediately. It would be impossible to do it in thirty days;' and he said: 'Well, I will see about it,' and a few days afterward he came and said: 'I am willing to sign up an agreement that you have another month.' Q. For what purpose? A. I should have another month to get out my stock. Q. And did you sign such an agreement? A. Yes, and he charged me ten dollars a month more for the privilege of giving me thirty days of getting my stuff out."

It is true the plaintiff denied this conversation, in part, at least. His testimony, at most, only raises a conflict, but does not alter the fact that the record contains sufficient evidence, if accepted by the court, to sustain the finding. The court accepted it and its action is binding on this court.

[3] Counsel raises the point that the evidence of plaintiff above quoted is inadmissible, because it was parol evidence introduced for the purpose and had the effect of adding to the terms of a written contract. This evidence was admitted without objection and its admissibility cannot be questioned for the first time in this court.

"Parties who permit a fact to be proved by incompetent evidence, without objection, waive all question of inadmissibility. This is true even of the statute of frauds and as to witnesses 'incompetent to testify.'" (*Walberg v. Underwood*, 39 Cal. App. 748, [180 Pac. 55].)

"Conceding now that the contract declared on was void, by reason of the statute of frauds, because it was verbal, still, as no objection was made by plaintiff to the evidence when offered, it must be held that the right to invoke the statute of frauds was waived by the appellant, and it cannot now be invoked in this court as a reason why the judgment should be reversed or a new trial granted. The defense of the statute of frauds can be waived, and that it was waived by the plaintiff in failing to object at the time to the parol evidence when offered, we think there can be no doubt." (*Nunez v. Morgan*, 77 Cal. 427, at p. 433 [19 Pac. 755].)

The finding of the court that the plaintiff for an increased rental agreed that plaintiff might have until September 30, 1918, to remove the property in dispute, being supported by the evidence, is decisive of the case, and renders a discussion of other points unnecessary.

The judgment is affirmed.

Burnett, J., concurred.

HART, J., Concurring.—I concur in the judgment and also in the proposition, stated by the acting presiding justice, that the point made by appellant that the parol testimony disclosing the purpose for which the new or additional lease was given to the defendant is incompetent and, therefore, was inadmissible, is not reviewable because it was not objected to and hence the objection must be deemed to have been waived. But I do not think that that testimony was incompetent. The terms of the additional lease were these, to wit: That the defendant might use and occupy the room known as the "Gem Theater" situated in the Herald Building, in the town of Colusa, for the term of one month, beginning on the first day of September, 1918, and ending September 30, 1918, for the sum or rental of sixty dollars for said month. These terms could not, of course, be changed by parol. The defendant could not have proved by parol, except under a plea of fraud or mistake, that the lease was for a longer term than one month or that the rental was less than that specified in the writing. But the testimony referred to was not offered for that purpose. It was not offered to vary the contract as it was written in any respect or to substitute new terms for those expressed in the

writing. Its sole purpose was to show the reason why the lessee asked for and secured an extension of the lease for one month. The obvious purpose of the testimony was to show that the plaintiff recognized the defendant's ownership of the furniture and fixtures and his right to remove them upon the expiration of the term, and that his failure to remove the property within the original term or at the expiration thereof was because he did not have sufficient time within which to do so. I do not understand the main opinion to hold that the testimony was inadmissible, but the conclusion therein upon the question of its admissibility is upon the assumption that it was improper testimony, hence these views by me, and with these views I perceive no conflict in anything said in the case of *Harrison v. McCormick*, 89 Cal. 327, 329, [23 Am. St. Rep. 469, 26 Pac. 830], cited by appellant. In that case it was held that "where a contract for the sale of merchandise is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence is inadmissible to show a sale by sample." The rule so stated is unquestionably correct, but it does not fit this case as to the point here considered.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 9, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2009. Third Appellate District.—October 10, 1919.]

MERCANTILE TRUST COMPANY OF SAN FRANCISCO
(a Corporation), Respondent, v. **STOCKTON TERMINAL AND EASTERN RAILROAD COMPANY** (a Corporation), Appellant.

[1] **DEFAULTS—MOTION TO SET ASIDE—DISCRETION OF TRIAL COURT—ACTION AGAINST CORPORATION—SERVICE OF SUMMONS ON SECRETARY—EXTENSION OF TIME TO PLEAD.**—The granting of motions to set aside defaults is largely in the discretion of the trial court, and its action will not be disturbed unless there has been an abuse of such discretion; and in this action to foreclose a mortgage it

would have been an abuse of discretion to have granted the motion of the defendant corporation to set aside a default entered by the clerk of the court against it after its time to appear in the action had fully expired, no order having been made extending its time to plead, notwithstanding an order was made giving the secretary of the corporation personally, he being the individual upon whom service of summons on the corporation was made, an extension of time to plead.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. H. Carpenter for Appellant.

Morrison, Dunne & Brobeck and J. F. Shuman for Respondent.

ELLISON, P. J., *pro tem.*—This suit was brought by plaintiff against the Stockton Terminal and Eastern Railroad Company to foreclose a mortgage made by it to plaintiff to secure an issue of bonds of the defendant company. When the suit was brought one C. M. Prater was secretary of the defendant corporation. His name did not appear in the complaint as a party to the suit. In the action summons was delivered to the sheriff of San Joaquin County for service and his return thereon was to the effect that he served the same upon the defendant corporation on the eleventh day of June, 1917, by delivering to and leaving with C. M. Prater, as secretary of said Stockton Terminal and Eastern Railroad Company in San Joaquin County, a copy of said summons attached to a copy of the complaint therein.

On the twentieth day of June, 1917, said court made the following order: "For good cause shown, it is hereby ordered that C. M. Prater, served as one of the defendants in the above-entitled action, have until the first day of July, 1917, to appear and demur or file such other answer as he may desire."

On the twenty-sixth day of June, 1917, no answer or demurrer having been filed by the defendant company, the county clerk of said county, on application of the plaintiff, duly entered the default of said defendant. On the thirtieth day of June, 1917, said defendant company (after its default

had been entered) served and filed with the clerk of said court a general demurrer to the complaint in said action.

On the twentieth day of December, 1917, the defendant company gave notice of a motion to set aside its default on the ground (as stated in the notice) that it was entered "when defendant's time for appearing, demurring or answering as allowed by the Judge of said court had not expired," and upon the ground that it was wrongfully and unlawfully entered by the plaintiff for the purpose of depriving the said defendant of its day in court.

The affidavit upon which said motion was heard, made by C. M. Prater, secretary of the corporation defendant, stated that on June 11th he was served with summons in the action; "that he was not informed by the serving officer and he did not know whether such service was upon him individually or as an officer of said Railroad Company"; that thereupon he obtained an order from the judge of said court "whereby affiant was granted until some time in July, 1917, to appear in said action; that after the said order was made and while it was in full force and effect, the plaintiff wrongfully and unlawfully caused default to be entered against the defendant corporation whereby said defendant and the affiant were unlawfully deprived of their day in court and prevented from making its or his appearance in said case and in direct violation of the order of the court."

When said motion to set aside said default came on for hearing it was denied by the court and thereafter judgment of foreclosure was given and made. The defendant appeals from the judgment and the only point made is that, under the indicated circumstances, the clerk had no authority to enter the default and that the court erred in denying his motion to set it aside.

The foregoing chronological statement shows, first, that when the clerk entered the default of the defendant corporation its time to appear in the action had fully expired and it was his duty upon application of the plaintiff to make the entry he did; second, that no order had ever been made, either by the court or judge, extending the defendant corporation's time to plead; the order giving further time to plead, made on June 20, 1917, was an order that C. M. Prater, served as one of the defendants, have until July 1st to plead. This was not an order extending the time of the corporation to

plead, and it does not appear that said corporation ever asked for any extension of time; third, after the defendant's default had been regularly entered it had no right to file a demurrer or any other pleading until the default had been set aside. There are some cases holding that where defendant files a demurrer after his time to plead has expired but before his default has been entered, the court should dispose of it in some way before entering judgment, but this is not such a case; fourth, the defendant's motion to set aside the default was properly denied. [1] It is difficult to know on exactly what ground it was made. The affidavit in support of it does not allege mistake, surprise, or excusable neglect. The gist of it seems to be contained in the following: "That after said order was so made granting further time to affiant to so appear and while said order was in full force and effect, the plaintiff herein wrongfully and unlawfully caused a clerk's default to be entered against the defendant Stockton Terminal and Eastern Railroad Company whereby said defendant and affiant, as such officer, and the person upon whom said summons has been served were unlawfully deprived of their day in court, etc." A sufficient answer to all this is found in the fact that no order was ever made extending the time for defendant corporation to plead, and as to affiant, personally, it does not appear that his default was ever entered or that he ever filed any pleading, and, lastly, the granting of motions to set aside defaults is largely in the discretion of the trial court, and its action will not be disturbed unless there has been an abuse of such discretion. On the showing made in this case it would have been an abuse of discretion to have granted the motion.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 7, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2920. Second Appellate District, Division Two.—October 10, 1919.]

MARIE M. BOURNE, Respondent, v. HOPE BOURNE et al., Appellants.

- [1] **ALIENATION OF AFFECTIONS—ACTION FOR DAMAGES—STATE OF HUSBAND'S FEELINGS—EVIDENCE—HEARSAY DECLARATIONS.**—In an action for damages by a wife against her husband's parents for the alienation of the husband's affections, testimony of the plaintiff, supplemented by that of her witnesses, as to declarations which they claimed the husband made in their presence, of criticism and unkind remarks, and attempts to influence him against his wife, made by his parents, chiefly his mother, is admissible for the purpose of showing the state of the husband's feelings during the period in question; and its admission over the objections of defendants' counsel that it is incompetent and hearsay is not error, where the jury are expressly instructed that they are to receive it for no other purpose, and that it is not competent evidence to prove any of the conduct or statements therein attributed to the defendants.
- [2] **ID.—EVIDENCE COMPETENT FOR SINGLE PURPOSE—ADMISSIBILITY OF.** Where evidence is competent and material for any purpose under the issues on trial, it is admissible for that purpose, although it may be inadmissible and prejudicial when applied to other issues to which it is pertinent.
- [3] **ID.—DETERMINATION OF HUSBAND TO ABANDON WIFE—ASSISTANCE BY PARENTS—LIABILITY—PRESUMPTION OF BAD MOTIVE.**—Where the determination of the husband to abandon his wife was the result of his own volition and not influenced by any willful or malicious act of his parents, the latter cannot be held responsible because they assisted him in carrying out his purpose; and no presumption of a bad motive arises from the mere fact that they gave him such assistance.
- [4] **ID.—MARRIAGE OF CHILD—RIGHT OF PARENTS TO FURTHER CONSIDER WELFARE OF.**—The marriage of a child does not terminate the right

3. Liability of parent or guardian for causing separation of husband and wife, notes, 8 ANN. CAS. 813; ANN. CAS. 1917E, 1017; 9 L. E. A. (N. S.) 322.

Malice as essential to action for alienation of affections by parent, note, 46 L. E. A. (N. S.) 779.

Admissibility of evidence of defendants' financial circumstances in action for alienation of affections, note, ANN. CAS. 1914B, 803.

of the parents to interest themselves in his or her happiness and welfare; and so long as they in good faith act for what they believed is their child's welfare, no matter how mistakenly, and are not moved by malice or ill will toward the partner to the marriage, there is no liability, even where they use their influence to bring about a separation.

- [5] **ID.—RELATIONSHIP OF PARENT AND CHILD—RIGHT TO SIDE WITH CHILD IN CASE OF MARITAL INFELICITY—MALICIOUS INTERFERENCE—PRESUMPTION.**—The relations of a parent, particularly of a mother toward her son, are scarcely less sacred than the relationship between husband and wife; and in cases of marital infelicity, no presumption of malicious interference arises because the parents take sides with their child, unless it affirmatively appears that it is done in bad faith and from ill will toward the other party.
- [6] **ID.—SAYING OF HARSH AND UNKIND THINGS—INFERENCES.**—The fact alone that in moments of resentment of their daughter-in-law's actions and refusal to accept their attempts at reconciliation the husband's parents said harsh and unkind things about her will not justify an inference that they violated the laws of God and society by trying to break up the marriage relation of their son and his wife.
- [7] **ID.—SEPARATION BY SON—FAILURE TO ASSIST DAUGHTER-IN-LAW—INFERENCES.**—The fact that the parents permitted the separation of their son without offering any aid or comfort to the deserted wife constituted the violation of no legal duty, and in itself raised no inference that they instigated his desertion.
- [8] **ID.—CONSIDERATION OF EVIDENCE—PROVINCE OF JURY.**—While the jurors are the sole judges of the weight and sufficiency of evidence, their province in receiving or rejecting evidence, as they are by the court instructed, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.
- [9] **ID.—ACTION FOR DAMAGES—ESSENTIALS TO RECOVERY.**—In an action for damages by a wife against her husband's parents for the alienation of the husband's affections, the plaintiff, to support a verdict against the defendants, must establish that the defendants knowingly and willfully influenced their son to withdraw his affection and companionship from her, and that this was done in a spirit of malice and ill will toward her.
- [10] **ID.—PRESENCE OF MOTIVE FOR ALIENATING SON'S AFFECTIONS—LOSS OF LOVE FOR WIFE—EVIDENCE OF CAUSE.**—The fact that the parents may have had a grudge against their daughter-in-law, or a motive for alienating their son's affections, would not suffice to prove that his love for his wife waned and flickered out as the result of his parents' conscious and willful influence or persuasion, and not as the result of some innate cause born within his breast

unassisted by any acts on the part of his parents, done for the purpose and with the intent of bringing about that condition of heart within him.

- [11] **ID.—ABSENCE OF EVIDENCE OF ILL WILL OR MALIGN INFLUENCE—UNSUPPORTED VERDICT.**—In this action for damages by a wife against her husband's parents for the alienation of the husband's affections, in view of the absence of any direct evidence of ill will or malign influence on the part of the defendants, the evidence was wholly insufficient to justify a verdict against strangers, much less as against the parents.
- [12] **ID.—PREFERENTIAL RIGHTS OF PARENTS—PRESUMPTIONS AS TO ACTS.**—In actions for damages for alienation of affections the law places the parents of a married child on a much more favorable basis than that of a stranger to the family relations; and in such actions all presumptions must be that the parents acted only for the best interests of their child.
- [13] **ID.—WEALTH OF PARENTS—HEARSAY DECLARATIONS.**—In an action for damages by a wife against her husband's parents for the alienation of the husband's affections, it is error to admit, over the objections of defendants' counsel, plaintiff's testimony of declarations by her husband as to his father's wealth.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Ward Chapman and L. M. Chapman for Appellants.

J. W. McKinley, Nat. B. Browne and A. W. Ashburn for Respondent.

SLOANE, J.—The plaintiff, Marie Bourne, brought this action against Harry S. Bourne and Hope Bourne, the parents of her husband, Ralph Bourne, to recover damages for the alleged alienation of her husband's affections. The case was tried before a jury, and there was a verdict and judgment for twelve thousand five hundred dollars in plaintiff's favor. The defendants appeal, basing their claim for reversal on insufficiency of the evidence to support a verdict, and error of the court in giving and refusing instructions and in the admission of evidence.

The weak point in plaintiff's case is insufficiency of the evidence that the desertion of plaintiff by her husband was caused or influenced by the fault of the defendants or that

the conduct of defendants was influenced by malice. Eliminating the hearsay evidence of all that the plaintiff and her witnesses said that the husband, Ralph Bourne, said that his parents said—and there is not a scintilla of evidence worthy of serious consideration that either the father or mother ever by word or deed tried to bring about a separation between the plaintiff and their son—there is no evidence, up to the day that Ralph Bourne deserted the plaintiff and left his home and wife—outside of this hearsay testimony—other than one isolated instance, that the father, Harry S. Bourne, ever displayed in any manner any ill will toward his daughter-in-law, or evinced any disposition that would suggest a desire to alienate from her the affections of her husband. And there are only infrequent expressions of criticism and ill-feeling toward her on the part of the mother on which to base any inference of adverse or hostile feeling on the mother's part, and these gain most of their significance when considered against the background of the hearsay testimony referred to.

This hearsay testimony, as has been indicated, consisted of the testimony of the plaintiff, supplemented by that of some of her witnesses, as to declarations which they claimed the husband, Ralph Bourne, made in their presence, of criticism and unkind remarks, and attempts to influence him against his wife, made by his parents, chiefly his mother. The following excerpts from the transcript of the evidence will serve to illustrate the character of this testimony as to alleged declarations of Ralph Bourne: "He told me that they spoke to him about coming back, and that he could not possibly get along over in Glendale because he couldn't earn his living; . . . and they said they would do anything he wanted if he would come back to Eagle Rock, and Ralph was very indignant about it, and he told me about it, and said for me not to mind what they said because they could never get him away from me. . . . Well, Ralph was very angry with his folks because he always told me never to mind what his folks said about me, because he didn't believe them; that he would never leave me for any reason in the world; . . . that he would never leave me to go back to his folks. . . . Sometimes he wouldn't tell me all that was said until later. He used to say that he didn't like to tell me everything that they said, because he said it would make me feel bad if I knew that

they were talking about me. . . . Well, at first he was very indignant about it; he didn't like to talk about it at all, because he thought it would make me feel bad, and he would always tell me that he cared more for me than anything in the world, and he would usually be very much more affectionate after he had had a talk with his folks about it; and one instance toward the last, about two weeks before he went away, he sort of sided in with his folks; he sort of drifted to their side as the time went on. . . . I told him several times that if they talked to him so much that perhaps he would leave me and go back to them. He said he never would. He said nothing in the world could ever make him leave me. . . . Ralph told me several times that they had offered him inducements; they told him that they would send him to college and pay all his bills if he would leave me—put him on his feet. . . . They always said he would never get along while he was married to me. . . . Well, at first he was very indignant with his folks, and then toward the last he sort of seemed to be drifting toward them—told me I ought to see things the way they saw them; and that was about the last that we were living together. . . . Mrs. Bourne talked to Ralph and called me every name that she could think of, and told Ralph that I was absolutely no good, and he would be better off if he had never seen me."

[1] There was a good deal more hearsay testimony of this character. It all went in over the objections of defendants' counsel that it was incompetent and hearsay, and under a ruling of the court that it was admitted only for the purpose of showing the state of the husband's feelings during this period; and the court expressly instructed the jury that they were to receive it for no other purpose, and that it was not competent evidence to prove any of the conduct or statements therein attributed to the defendants.

It is probable that the court was correct in its ruling, although there were some of these hearsay narratives attributed to the husband, which gave purported damaging statements of his parents, that were not accompanied by any evidence of his own feelings in the matter. A fair consideration of the rulings on the extent to which such declarations may be used in evidence, in *Cripe v. Cripe*, 170 Cal. 91, [148 Pac. 520], *Humphrey v. Pope*, 1 Cal. App. 375, [82 Pac. 223]; *Barlow v. Barnes*, 172 Cal. 98, [155 Pac. 457], and *Jameson v. Tully*,

178 Cal. 380, [173 Pac. 577], are in accord with the ruling of the trial court on this question. [2] It is undoubtedly the law that where testimony is competent and material for any purpose under the issues on trial, it is admissible for that purpose, although it may be inadmissible and prejudicial when applied to other issues to which it is pertinent. (14 R. C. L. 52; *Trenton etc. Ry Co. v. Cooper*, 60 N. J. L. 219, [64 Am. St. Rep. 592, 38 L. R. A. 637, 37 Atl. 730]; *MacDougall v. Maguire*, 35 Cal. 274, [95 Am. Dec. 98]; *Birmingham Trust & Sav. Co. v. Currey*, 75 Ala. 373, [Ann. Cas. 1914D, 81, 57 South. 962]; *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, [15 L. R. A. (N. S.) 775, 92 Pac. 922]; *Baustian v. Young*, 152 Mo. 317, [75 Am. St. Rep. 462, 53 S. W. 921]; *Illinois etc. R. R. Co. v. Houchins*, 121 Ky. 526, [123 Am. St. Rep. 205, 1 L. R. A. (N. S.) 375, 89 S. W. 530].) In this case the court did the best it could in safeguarding the defendants from prejudicial consequences of this testimony by instructing the jury to disregard it for any purpose other than that of showing the state of the husband's feelings. There was abundant other evidence of Ralph Bourne's affection for and loyalty to his wife during all the period covered by these hearsay declarations; and, indeed, there was no dispute on that point. In view of the seriously prejudicial nature of these statements on the main issue in the case, as to the conduct and motives of defendants, plaintiff's counsel were taking unnecessary chances of error in insisting upon the introduction of these hearsay declarations. The introduction of this testimony presents a feature of the case which at least invites a careful scrutiny of the other evidence directed to this issue, in determining whether the jury was justified in finding the defendants guilty of separating this young married couple. In view of the absence of any direct evidence of ill will or malign influence on the part of defendants, and the testimony of the husband and both the defendants that no such occurrences took place as were referred to in the hearsay declarations, it is difficult to escape the conviction that the jury was prejudicially influenced by considering the hearsay statements in disregard of the instructions of the court. In the argument by their brief on this appeal, respondent's counsel, speaking of these declarations, suggest their force as a determinative influence in the mind of the jury as to the fact of inducements being offered by

the defendants to alienate Ralph's affection from his wife. They say: "The nature of these declarations, and the accompanying manifestations of affection for the wife and indignation against the parents, *throw light upon the nature, extent, and force of the inducements or threats which must have been held out or made to Ralph Bourne* in order to impel him to treat his wife so cruelly and desert her with an intention never to return." Again, it is said: "They point to the *degree, amount, and kind of persuasion and inducements that must have been held out to Ralph Bourne* in order to induce him to desert his wife."

It is apparent, from the undisputed evidence, that the marriage of this young couple took place with the full consent and approval of the defendants. The plaintiff, before the marriage, was a frequent guest at defendants' home, and sometimes spent the night with them. They were present at the marriage ceremony, and provided a home for the young couple with the declared purpose of ultimately deeding it to them. The mother-in-law spoke in high terms of approval of the new daughter-in-law, stating to one of plaintiff's witnesses that Ralph had married her "because he knew she was a good, pure girl." Both the parents wanted the young couple in their company, and the mother was particularly solicitous to have the companionship and affection of her son's wife. If any criticism can be made of the attitude of the defendants toward their daughter-in-law during the first few months of the marriage, it was for over-zealousness and officiousness for her welfare. They probably were not always wise or discreet, and, according to plaintiff's testimony, were inclined to impose upon the young couple too dictatorial a supervision of their conduct and affairs; but that anything was said or done by these defendants which was not meant in kindness and for the good of both their son and his wife during the first months of their marriage, is not seriously contended.

The plaintiff was eighteen years of age and her husband was twenty-one when they were married in May, 1913. He was the only child of the defendants. There was nothing worthy of serious consideration that occurred in the family to disturb the harmony of any of their relations, particularly as relates to the conduct of defendants, for several months. There had been some criticism, which was neither unkindly

nor perhaps unmerited, regarding the plaintiff's disposition to "gad," as the witness termed it; and the plaintiff had, on two or three occasions, been unreasonably resentful of what she considered officious solicitude of her husband's parents in her domestic affairs. But nothing serious occurred until about the 1st of March, 1914, nearly a year after the marriage. The plaintiff was away from her home in Eagle Rock on one of her frequent visits to her friends in Glendale, when her husband, who was working for his father in Eagle Rock, met with an automobile accident. The Ford car which he was driving overturned, and he was quite badly strained and bruised. He telephoned his wife, and she, instead of coming home to him, had him come to her friend's home in Glendale, where she was staying to dinner. While he was there, his parents heard of the accident, and were very much concerned, not knowing how badly he was hurt. They telephoned to Glendale, and afterward met the young couple at the street-car when they returned home in the evening. By this time Ralph, the husband of plaintiff, was suffering a good deal from his injuries, and could walk only with difficulty. The party went together to defendants' home, which was near that of the young people, and there defendants urged them to come in and stay all night, where they had better accommodations, could telephone for a doctor, if needed, and where the parents could assist in caring for their son. This the young people refused to do, and a quarrel ensued. The testimony is very conflicting as to what occurred, as narrated by the plaintiff on the one side and her husband and defendants on the other. But, accepting plaintiff's version of the event against the three other witnesses, everybody was wrought up and excited. The father insisted on the son remaining, and commanded the daughter-in-law to come along into the house, and, as she claims, caught hold of her wrists and tried to draw her in. She also testified that the mother-in-law called her a snake and a rat, and said that she was not even human. Plaintiff, in turn, used some rough language, and, it is admitted, invited her father-in-law to "go to hell." Plaintiff and her husband eventually went to their own home, and a few days thereafter, influenced by this quarrel, moved from there to Glendale, where the husband obtained employment away from his parents.

This unfortunate episode, which was evidently the result of the nervous strain under which all of them were laboring, and the natural anxiety of the parents over the accident to their son, they not knowing how serious his injuries might be, ought never to have made a breach in the family relations, irrespective of who was the greater offender. That the parents tried to avoid any such result is evident from the fact that they at once commenced to make overtures to the young people, and showed a desire to conciliate them and to heal the breach. This effort continued throughout the several months that plaintiff and her husband remained at Glendale. During all this time plaintiff maintained a hostile attitude toward the defendants, and evidently resented her husband's inclination to a reconciliation. Ultimately, through the repeated advances of the parents, plaintiff and her husband accepted the olive branch, and, after an exchange of visits, an arrangement was agreed on whereby plaintiff and her husband went back to Eagle Rock to live with defendants until their cottage, which had been rented, would be available for their occupancy, the son again taking employment with his father. This was in January, 1915. The parties continued to live together in this way until some time in March, apparently in unusually amicable relations, for two families occupying the same house. About the only criticism plaintiff has to make of the defendants during this period is that the parents were too insistent on being in her company and desiring her society.

Then came the second, and final, serious episode in the relations of these two families—the result of an evident misunderstanding, for which the plaintiff was apparently as much to blame as anyone else. Mrs. Bourne, the elder, had a woman friend—a Mrs. Visel—who frequently visited at her home, and with whom she was talking one day about her daughter-in-law's skill in sewing. She made a remark about her sewing which all parties agree was perfectly harmless, and more in the nature of praise than of criticism. Mrs. Visel repeated this to plaintiff in a way to leave the impression that the mother-in-law was finding fault. Plaintiff then gave her version of the matter to her husband. He, in turn, repeated it to his father; and the father took his wife to task for having made an unkindly criticism of the daughter-in-law. By the time the story got back to the mother, she received the impression that Mrs. Visel had misrepresented the incident and

was trying to make trouble in the family. Returning to her home, she found Mrs. Visel there, and, in the presence of all the parties to this action, called Mrs. Visel to account, and accused her of misrepresentation and mischief-making. The plaintiff took Mrs. Visel's part, and all the women evidently became much excited, and a good deal of harsh language was indulged in; and the elder Mrs. Bourne ordered Mrs. Visel to leave the house. Plaintiff decided to go with her, and the young husband followed his wife. It is entirely obvious that the conduct of the elder Mrs. Bourne in this matter was influenced by her anxiety to keep on good terms with her daughter-in-law. In fact, throughout this period, while the two families were together, there seemed to be an almost feverish solicitude on the part of the parents to cultivate the goodwill of the plaintiff; and that it was not entirely on the son's account is shown by the efforts of the mother to have the plaintiff in her company, and to elicit some sentiment of daughterly regard.

This second separation of the families occurred about two years after the marriage of the young people and about four months before the plaintiff was deserted. During all this time the young husband sided with his wife in whatever differences occurred, and was admittedly deeply in love with her, and, according to the wife's testimony, expressed great indignation at anything like a hostile attitude toward her on the part of his parents. If there had been any attempt on the part of the parents to alienate him from his wife, it had, up to this time, been a signal failure.

After this second episode, the young people again moved into apartments of their own, but the son continued in the employment of his father. Friendly relations were not resumed with the plaintiff, although the parents made overtures in that direction by taking the young people products of their home garden, and inviting them to join in auto trips. The plaintiff repulsed these advances, and displayed a spirit of unrelenting hostility to the husband's parents. She evidently, as her husband testifies, resented any approaches to social intimacy with them on the part of their son, and virtually admitted that she insisted upon his giving up all family relations with them. Reading between the lines of plaintiff's own testimony, it is evident that this matter became one of some tension and bitterness between

them, she insisting and he refusing to entirely give up friendly relations with his parents. The following questions and answers from plaintiff's testimony point to these conclusions: "Q. Haven't you told your husband many times that if he did not side with you and give up his parents you would leave him? A. No, sir; not until about a month before he left. Q. Now, you say that it was not until the last month that you lived together that you did tell your husband that he could take a choice between you and the parents? A. I don't know that I ever used those words to him. Q. Well, what was said during the last month about your leaving him unless he would side with you and give up his parents? A. I think one evening Ralph came home . . . and I asked him where he had been, and he said that he had worked late; and I asked him if he hadn't been with his folks, and he finally owned up and said that he had; and I told Ralph that I didn't think he was doing the right thing by me to see his folks and not telling me about it; and I told Ralph that I thought he ought to have some consideration for me. I don't think that I said, 'I will leave you if you don't give up your folks for me.' I am sure I didn't, not in those words." And again: "Q. When was the first time you told Ralph you thought he ought to give up his folks because they were talking about you? A. During the last month or month and a half that we were together. Q. Do you mean to say that you didn't say that to him long before that? A. We talked it over in a general way. I never used those words; just sort of general talk. Q. Well, now, you supposed, did you not, after this scene in the house with Mrs. Visel present, that he had given up his folks entirely, didn't you? A. Not entirely, because he was going to work there, continue work. Q. And you knew, of course, he was going to continue to work with his father, but you didn't think there was going to be a continuation of the social relations between him and his parents? A. I knew there would be no relations between the four of us." The testimony of the plaintiff's husband was that there was, during the last three or four months, bitter and repeated quarrels between them because he refused to give up all affectionate relations with his parents; and the above admissions of plaintiff, and other circumstances shown in evidence, tend strongly to corroborate this.

It is quite evident that, for reasons good or bad, the plaintiff had assumed an attitude of implacable enmity toward her parents-in-law. Indeed, it seems to be on this attitude on her part that plaintiff's counsel largely base their inference that the parents sought to alienate her husband from her. She did not like them. She refused to be reconciled with them. Therefore, they must have resented it and tried to take her husband from her. That is not a fair legal inference, and it finds no support in the evidence. As has been suggested, there is some evidence of isolated criticisms and unfriendly comment by the mother. Mrs. Visel was the principal witness to these incidents, and as she and the elder Bournes were not on speaking terms after the final break between the families in March, whatever she may have heard must have occurred prior to that time, and was, as one might say, condoned by the subsequent reconciliation and era of good feeling between the parties. Mrs. Visel testified that at one time the elder Mrs. Bourne said of the plaintiff that she was a snake, and that she wasn't human. This is the same language that the plaintiff herself testified that her mother-in-law used at the time of the trouble over the automobile accident, and Mrs. Visel locates her conversation at about the same time; so the words used on both occasions probably arose out of the same grievance. Mrs. Visel also testifies that after the quarrel, and while the young folks were living in Glendale, the mother often expressed regret that her son was away from her, and told how unhappy she was; "that it was ridiculous that he was away; that he belonged with them, and that he would come if it wasn't for Marie; that it was her ambition to get him back; that he belonged at home, and that was where she was going to have him if it was the last thing she ever did." She seems to have accomplished this purpose, and succeeded in getting both Ralph and Marie at home, where all of them lived very amicably together for some time; and the means she used to secure the return of her son and his wife were friendliness and conciliation toward both. Mrs. Visel further testified that at the time of the second separation of the families, in the quarrel in which she was involved, the elder Mrs. Bourne accused her of telling lies to cause trouble and accused Marie of telling lies, too, in order to keep her husband's affection, and that Ralph came in during the quarrel

"and tried to bring about peace; he tried to quiet his mother down, and also his wife."

Mrs. McDonald, the plaintiff's mother, testified that on one occasion the elder Mrs. Bourne spent the evening with her and talked about Marie all the time. This was in the winter of 1914, evidently while the young people were living at Glendale. She testifies that Mrs. Bourne said that Marie was not a good housekeeper; that it would have been better for Ralph if he had never married her, and that he would never get along. Mrs. McDonald also testified that she saw the defendant Harry Bourne the day after the trouble over the automobile accident, and that he said: "Ralph was going with another girl at the same time as with Marie, and that he wished Ralph had married the other girl. He said she was not a good housekeeper, and was extravagant, and that Ralph would have been better off if he had not married her."

There may have been some other statements of like nature, but the foregoing is substantially the sum total of any expression, by act or word, prior to the date of the separation of plaintiff and her husband, tending to show malice or ill will on the part of the defendants toward the plaintiff. This and the two quarrels they had, and the fact that the plaintiff herself had given them little cause to feel kindly toward her, is the sole basis for the inference that the defendants had willfully and maliciously alienated their son's affections from his wife or influenced him to desert her. There is no direct evidence whatever that they ever, by any word or conduct directed to or in the presence of their son, attempted to influence his relations with his wife.

There is only one other circumstance in this unfortunate family tragedy tending to connect the defendants with the separation of their son from his wife. On the 10th of July, 1915, the desertion took place. Ralph Bourne, in the absence of his wife from home on that day, went to their apartment, packed up his belongings and some of the wedding presents he and his wife had received at their marriage, and departed. He took an east-bound train for New York, and did not return to Los Angeles until about the time of this trial. It is admitted that on the 7th or 8th of July he disclosed to his parents his intention to leave, and asked for money for his trip. He and both the defendants testify that the parents objected to his separation from his wife, and urged upon him

his duty to his marriage relations. There is no evidence to the contrary, unless such inference may arise from the fact that they assisted him in leaving. As a matter of admitted fact, the father furnished him the money for his railroad fare and expenses, and on the day that he left took him in his automobile to a point near where Ralph and his wife lived and waited there for him to get his belongings from the apartment. The desertion, if the plaintiff's story is true, was cruel and indefensible. Even in the light of the husband's explanation, it was cowardly. [3] But if the determination to abandon his wife was the result of the husband's own volition, and not influenced by any willful or malicious act of the defendants, they cannot be held responsible because they assisted him in carrying out his purpose. They had a perfect legal right to side with their son in this separation, if it was done in belief of his story of the cause of his leaving and in sympathy for him, and not because of malice and ill will toward his wife. The New York court of appeals, in the case of *Servis v. Servis*, 172 N. Y. 438, [65 N. E. 270], says: "Of the absolute right of a father to furnish money for the support of a son who has for reasons good or bad determined to abandon his wife, there is of course no doubt; a right that he may exercise without being subjected to respond in damages, provided its exercise be not part of a general scheme having for its object the alienation of the husband's affections from the wife and her abandonment by him."

The plaintiff's cause of action is for alienation of her husband's affections and inducing the desertion. If the state of mind which induced this desertion was caused by the willful and malicious influence of the parents, they would be liable, irrespective of whether or not they assisted him in his plans to go away. If his loss of affection for and determination to leave his wife arose from their own domestic troubles, whether over the wife's implacable purpose to break up his relations with his father and mother or otherwise, and without malicious interference of the defendants, they are not legally responsible, no matter what assistance they gave him in carrying out his purpose; and no presumption of a bad motive arises from the mere fact that they gave him such assistance. (*Reed v. Reed*, 6 Ind. App. 317, [51 Am. St. Rep. 310, 33 N. E. 638]; *Trumbull v. Trumbull*,

71 Neb. 186, [8 Ann. Cas. 812, 98 N. W. 683]; *Cripe v. Cripe, supra.*) [4] The marriage of a child does not terminate the right of the parents to interest themselves in his or her happiness and welfare; and they do not stand on the footing of a stranger to the domestic relations when such a charge as is here involved is brought against them. So long as they, in good faith, act for what they believe is their child's welfare, no matter how mistakenly, and are not moved by malice or ill will toward the partner to the marriage, there is no liability, even where they use their influence to bring about a separation.

[5] The relations of a parent, particularly of a mother to her son, are scarcely less sacred than the relationship between husband and wife, and are usually more unselfish. The home of the parents is the natural sanctuary of the children in cases of marital infelicity. It is not the policy of the law to leave this door open only at the risk of involving the parents in litigation for alienation of affection. No presumption arises of malicious interference because the parents take sides with their child, unless it affirmatively appears that it is done in bad faith and from ill will toward the other party. A mother has a right to fight to retain the affection and society of her boy so long as she does not try to interfere with his duty to his own domestic relations; and any wife who, without serious cause, interposes a barrier to her husband's affectionate regard for his mother, deserves to lose his love. We find no evidence in this case of anything but a spirit of friendliness and a desire to conciliate the regard and affection of this plaintiff on the part of defendants, for the first two years of her marriage with their son, a spirit which, if interrupted, was not broken by the one or two unfortunate quarrels, incidents for which the plaintiff's suspicion and unfriendly attitude toward her parents-in-law were largely responsible. And after the quarrel in March, 1915, some three or four months before the desertion of plaintiff by her husband, there is no reason to believe there was a day when the defendants would not gladly have welcomed a reconciliation with their daughter-in-law. They made every attempt in that direction that self-respect would permit, and their advances were coldly repulsed. [6] It is not unlikely in moments of resentment they said harsh and unkind things about her; but that fact

alone does not justify an inference that they violated the laws of God and society by trying to break up the marriage relation of these young people.

It must be remembered that there is no direct evidence that they did try to influence their son in this regard, but, on the other hand, the son and both defendants explicitly deny that any such influence was ever attempted; and each of them testified that the defendants, when told of his intentions, advised him to remain with his wife. The husband's explanation of the estrangement from his wife is that it resulted from constant quarrels over the wife's insistence that he give up all social relations with his father and mother. There is at least no evidence to rebut the statement of the defendants that they were so informed, and so believed, when they finally consented to aid their son in the separation. [7] It is a cruel and reprehensible circumstance that they permitted this thing to happen without offering any aid or comfort to the deserted wife. But, however unjustifiable this may seem, even in view of the plaintiff's hostility toward them, it was the violation of no legal duty, and in itself raises no inference that they instigated his desertion. It is sought to connect the mother with the preparation of the note left by the husband to inform the plaintiff of his desertion. Ralph Bourne and both defendants deny that she had anything to do with it. The only evidence tending to show that the mother had any part in this note is a single word written on its margin, which the plaintiff testified was in the handwriting of her husband's mother. A comparison of this with other exhibits showing the same word in the admitted handwriting of the mother alone seems to be a sufficient disproof of this testimony. But, in any event, it is an immaterial circumstance. The note was written after the determination of Ralph Bourne to leave his wife had been formed and declared, and at the most would indicate an acquiescence and co-operation in his avowed purpose, without being of the slightest value in showing that the defendants had influenced his determination in the matter, or in discrediting their testimony that they relied on the representations of their son as to the cause of his separation from his wife. The jury may have been justified in disbelieving the testimony of Ralph Bourne as to the cause of his leaving his wife, but there is no legal ground for rejecting the testimony

of the defendants that they believed their son's account of the matter. Their testimony in this regard is not impeached, either by direct evidence or by any legitimate inference or presumption from the known relations of the parties, or the circumstances of the case. (*Maupin v. Solomon*, 41 Cal. App. 323, [183 Pac. 198].) [8] While the jurors are the sole judges of the weight and sufficiency of the evidence, their province in receiving or rejecting evidence, as they were by the court instructed, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. [9] Two conclusions must be established by plaintiff in this case to support a verdict against the defendants: First, that they knowingly and willfully influenced their son to withdraw his affection and companionship from his wife, the plaintiff; and, second, that this was done in a spirit of malice and ill will toward the plaintiff. The circumstances proved and attempted to be proved, of quarrels with and criticism of the plaintiff, and assistance given to the son after he had announced his plans to abandon his wife, do not prove or even raise an inference of act or effort to alienate his affections from her. It may be conceded that if this primary fact was proved, these unkindly acts and expressions might be sufficient to support a finding of malicious purpose; but in the absence of any evidence of the primary fact, there is no foundation upon which any proof of malice or ill will can rest.

Respondent's counsel argue that the acts of the parents disclose a hostile feeling toward their daughter-in-law, that this feeling evidences a motive prompting them to alienate the son's affections, and that, therefore, the existence of such motive is a circumstance that may justify the inference that the parents did use persuasion and inducement to alienate their son's affection from his young wife. Seeking to draw an analogy between a case such as this and a prosecution for crime, counsel say: "Men are hung for less evidence than this. . . . Jones has a grudge against Smith, and Smith is found murdered; Jones is shown to have had the opportunity to commit the crime; his gun is found in the vicinity of the murder bearing evidence that one shot had been fired; at the trial he attempts to establish an alibi; the jury convicts him and the court upholds the conviction, and no reasonable man questions the fact that the evidence

is sufficient to establish all the elements of the crime." The analogy is entirely unsubstantial. In the supposititious criminal case instanced by counsel, a crime has been committed, the *corpus delicti* is established, and the question is, Who did it? Among other circumstances tending to point the accusing finger of suspicion toward the defendant is the fact that he had a motive for committing the crime. If the body of the dead man had been found under circumstances that pointed to suicide, the mere fact that the accused had a motive for the commission of murder would not show that the crime of murder had been committed, or established the *corpus delicti*. [10] So here, the fact that the parents may have had a grudge against their daughter-in-law, or a motive for alienating their son's affections, would not suffice to prove that his love for his wife waned and flickered out as the result of his parents' conscious and willful influence or persuasion, and not as the result of some innate cause born within his breast unassisted by any acts on the part of his parents, done for the purpose and with the intent of bringing about that condition of heart within him.

[11] Conceding its full probative force to all the evidence in behalf of the plaintiff, and disregarding, as we must, the denials and contrary testimony of the defendants, the evidence is insufficient for this purpose. The evidence here would not justify a verdict against strangers, much less as against parents. [12] The law places the parents of a married child on a much more favorable basis than that of a stranger to the family relations, in actions for alienation of affection. All presumptions in such cases must be that the parents will act only for the best interests of the child. (*Trumbull v. Trumbull*, *supra*; *Oakman v. Belden*, 94 Me. 280, [80 Am. St. Rep. 396, 47 Atl. 553]; *Multer v. Knibbs*, 193 Mass. 556, [9 Ann. Cas. 958, 9 L. R. A. (N. S.) 322, 79 N. E. 762]; *Reed v. Reed*, *supra*; *Tucker v. Tucker*, 74 Miss. 93, [32 L. R. A. 623, 19 South. 955]; *Hall v. Hall*, 174 Cal. 718, [164 Pac. 390].) In *Hall v. Hall*, *supra*, our supreme court states the rule as follows: "Having in contemplation the natural solicitude of the parent for the child, and the well-nigh universal experience of mankind that parents in their conduct toward their children are actuated by high and disinterested motives involving the sacrifice of their own interests for the welfare of their child,

it is not to be lightly inferred that the language or conduct of such a parent toward a child is prompted by evil or malicious motives. Therefore, to establish such willful and malicious alienation, the measure of proof must be extremely high," and "every presumption is that the parent acted for the best interests of the child." There is a striking parallel between the circumstances and relations of the parties as set forth in the opinion in the foregoing case and those of the present case; although the evidence of attempts by the parents of plaintiff's husband, in the case cited, to bring about a separation was much stronger than that against the defendants here. The court, however, held the evidence insufficient to sustain the verdict for plaintiff. There were other elements entering into the decision in the Hall case, and in the end it was the wife who left the husband; but the gist of her action was that her husband's affections had been previously alienated by the influence of her husband's parents. The decision in its entirety remains a convincing authority against the verdict of the jury in this case. The evidence in the case at bar is insufficient to support the conclusion either that any acts or representations of the parents alienated the affection of plaintiff's husband, or that such acts and representations as were shown in evidence were intended to alienate the husband's affections, or were done or made in a spirit of malice toward the plaintiff. It is difficult to escape the conviction that the jury, consciously or unconsciously, was influenced in its verdict by the hearsay declarations.

Appellants further urged as ground for reversal that there is no evidence in this case to justify holding the defendant Harry S. Bourne as a joint tort-feasor with his wife, even if the evidence is sufficient to support a verdict against the latter. We think this point is well taken. As has been pointed out, not one hostile word or act tending to show malice or ill will on the part of the father against his son's wife, or any effort on his part to bring about a separation, appears in the record, excepting the circumstances as testified to by plaintiff's mother; that after the quarrel and removal of the young folks to Glendale, incident to the automobile accident, the father-in-law said that he was sorry his son had not married another girl with whom he had kept company, and that Marie, the plaintiff, was not a good housekeeper. It is true the father-in-law was a party to the quarrel

the night of the automobile accident, and is alleged by plaintiff to have caught hold of her hands on that occasion in an attempt to compel her to come into the house. It would appear from his testimony that he was much concerned to get all the parties into the house to terminate a disgraceful scene on the street; but, in any event, this incident was entirely fortuitous and incidental, and it appears from the subsequent actions of all concerned, and particularly of the defendants, that it was fully condoned by subsequent reconciliation and good feeling between the two families. He had no connection whatever with the second quarrel, or with any subsequent events, excepting the assistance he gave his son at the time of his leaving his wife; and, as already pointed out, this was given under protest, and in the light of his son's representations that he had made up his mind to leave, and if his father did not help him he would get away as best he could. There is nothing to indicate that the father was in any way a party to, or countenanced or encouraged, the temperamental and at times apparently hysterical outbreaks of his wife.

[13] We are of the opinion, too, that there was error in the admission by the court, over defendants' objection, of plaintiff's testimony of declarations of her husband as to his father being worth seventy-five thousand dollars. This was clearly hearsay, had no legitimate value in proving the state of the husband's feelings, was contrary to the testimony of the defendant parent—who swore that he was not worth over fifteen or twenty thousand dollars—and quite probably influenced the comparatively large amount of damages found by the jury.

Judgment reversed.

Finlayson, P. J., concurred.

THOMAS, J.—I regret most sincerely my inability to secure the approval of my own conscience, which is absolutely necessary, in order to agree with my sincere, able, and distinguished associates in their conclusion as expressed in the foregoing opinion. I therefore dissent.

In view of what appears to me the importance of this case, coupled with the fact that this presents our first disagreement, I submit the case as I see it, rather than, as is customary, to discuss only the points upon which we disagree.

Plaintiff, in her amended complaint, alleges the activity of both defendants—her husband's father and mother—and their maliciousness in bringing about the alienation of affections and resultant desertion. Defendants, by their answer, deny "that they have had anything whatever to do with the depriving of plaintiff of the attention or support or comfort or society or the aid or assistance of her husband in any manner whatever."

The record here discloses, among other matters, the following facts: That plaintiff married Ralph Bourne on May 20, 1913, when she was eighteen and Ralph twenty-one years of age; that Ralph loved her when he married her, and continued to so love her at all times up to a date approximately that of the desertion, to wit, July 10, 1915; and that she was a devoted and loving wife. That on the date last mentioned Ralph told his wife he was going to work, and directed her to go to Los Angeles, borrow enough money from her sister to purchase a pair of shoes and some theater tickets, and meet him at 6:30 P. M. at the Hayward Hotel, in Los Angeles; that plaintiff did as directed; that shortly after plaintiff left home to carry out the plan as above stated Ralph and his father, Harry S. Bourne, drove up in the defendants' automobile to within one block of the apartment house in which Ralph Bourne and his wife were living, stopping in the rear of the apartment house, and Ralph, alighting from the automobile, went into his apartment, carrying a valise which had been furnished for that occasion by his parents; that he there encountered his mother-in-law, to whom he misstated his errand, and then proceeded to change his clothes; that he at that time left for his wife a certain "note," which, in words and figures, is as follows:

"July 10th, 1915.

"I simple am sick and tired of this life, so am leaving for good. I am taking the silver, and consider this a fair division, as you have your ring, and a couple of hundred dollars' worth of furniture.

"RALPH.

"P. S.—Don't blame my folks, as they are ignorant of my whereabouts."

On the back of this note appeared the following memorandum: "Silver, blue suit, shoes, collars, razor and strop, tooth brush, brushes, underclothes, jack bowl." The articles last

enumerated, and which he took away with him, had been given to Ralph and his wife as wedding presents. Having effected his "fair division," he returned to his waiting automobile, had lunch with his parents, and later in the day left Los Angeles for New York, his parents having furnished him the necessary railroad and Pullman tickets, together with sufficient cash to pay expenses. The plan to thus desert his wife was known by his parents as early, at least, as the 7th or 8th of July; but, notwithstanding this fact, it was kept an absolute secret from the plaintiff and her mother until after the foregoing was consummated. At the appointed time plaintiff was at the Hayward Hotel, carrying out her part of the plan implicitly, as directed by her husband; but he did not meet her. Instead, he was aboard a fast-moving train, traveling away from her as fast as steam could take him. Neither defendants did anything to communicate the fact of his departure to his wife. The defendant Hope Bourne was asked: "And did you notify her on the next morning after the desertion as to where Ralph had gone or why he had gone?" to which question she made the following answer: "Why should I? Why didn't Marie come to see me? I would have been glad to have seen her." It will be observed that this was not an answer, but an evasion of the question. And again she was asked: "And you never made any effort to see what was becoming of her after her husband left her in this manner?" and the following was her answer thereto: "I guess Marie is capable of taking care of herself."

One hundred and eighty pages of a two hundred and sixty page opening brief is directed by appellants to the discussion of the insufficiency of the evidence to support the verdict. Many points are urged for a reversal. I shall discuss only those which I deem essential for my present purpose.

The verdict is attacked as unsupported by the evidence. I am satisfied from an examination of the record that there was sufficient evidence—although not as weighty as might be desired—to justify the verdict, and hence to support the judgment; and this even though we disregard the declarations of the husband to his wife, without the presence of the parents. In discussing the sufficiency of the evidence, appellants urge that the court erred in permitting plaintiff to state, over defendants' objection, declarations claimed by Ralph to have been made by his parents to him concerning his wife, etc., in

an effort to induce him to leave her, and which declarations were made to the wife out of the presence of the defendants or either of them, the objection being general in its terms, and on the additional ground that it was hearsay as to these defendants. The learned trial judge, in referring to these declarations and in overruling the objection, said: "Of course, it is undoubtedly the rule that they are incompetent for the purpose of proving the existence of any fact which is included in those declarations, and the jury should be so instructed; but I take it, from the authority quoted by Mr. Ashburn and from consideration, that the general rule that, where the state of mind of the husband of the plaintiff be one of the things in issue, any declarations of his are verbal acts in so far as they tend to show that state of mind, and it is admissible for that purpose, and that purpose only." Right there and then the court admonished the jury accordingly; and with this view of the trial court I agree. (*Cripe v. Cripe*, 170 Cal. 91, [148 Pac. 520].) The same is true as to the evidence of Ralph as to what he told his wife he thought his father was worth. It was offered and received for the limited purpose of showing the state of Ralph's mind. It is the usual rule that, where testimony such as is now under discussion is sought to be introduced, to explain the purpose for which it is offered, and thus make it permissible for a limited purpose only; and, as we have already seen, this was done in the present case, and the trial judge, with great care and skill, and that no confusion might result therefrom, admonished the jury, as we have already seen. "It is a well-established rule that if evidence is properly admissible upon the issues presented, it cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties." (*Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 562, [147 Pac. 238], and cases there cited.) In view of the fact that the evidence objected to was competent for the purpose for which it was received, I fail to bring myself to the place where I must conclude that the jury willfully disregarded the court's instructions and admonitions in this respect. If any construction which the jury might have placed upon such evidence, concededly properly received for the stated limited purpose, be inimical to defendants' interests, that fact is not due to the jury or to the court, but to the state of the rules of evidence as they existed at the time of the trial. So believing,

I doubt the power of this court on appeal to disturb the verdict.

I believe the case of *Cripe v. Cripe*, *supra*, decisive of this phase of the case, notwithstanding that at first blush it would appear that the case of *Barlow v. Barnes*, 172 Cal. 98, [155 Pac. 457]—a later case—would seem to be in conflict therewith. This, I think, is more apparent than real. Respondent's argument here appeals to me. When considered in all its aspects, I think it not in conflict with the *Cripe* case, for a different point is decided. In the *Cripe* case it was held that, "in an action for alienating the affections of a husband or wife, the state of the feelings of such husband or wife is material." In the *Barnes* case the court held that the guilt of the defendant cannot be proved by declarations of the alienated spouse as to the acts or statements of defendant. From the language of the court, I cannot conclude that it intended to go any further than that or to announce a rule contrary to that applied in the *Cripe* case. In the *Barnes* case there were two alleged causes of action—one for alienation of the wife's affections and the other for damages for alleged criminal intercourse with the wife. When the letters in that case, objections to the introduction of which were sustained by the court, were sought to be introduced, there was no statement or explanation made to the court that they were offered for any limited purpose; and, so far as that case was concerned, such limited purpose would appear to have been to show *a state of mind or feelings* on the part of the alleged alienated spouse at the time the said letters were written, and thus to support the first cause of action, and in the absence of such explanation their reception might reasonably have led the jury to consider them in connection with the second alleged cause of action. In my opinion, the ruling of the trial court, under the facts as there presented, was absolutely correct. In the *Cripe* case, as in the case at bar, the offer of the letters and the declarations was accompanied by such explanation, the court, in overruling the objections in this case, so stating, and at the same time admonishing the jury as already indicated. Indeed, in the *Barnes* case, as one of the several propositions advanced, it was argued to the trial court by counsel for appellant "that they [the letters] were material to the issues under both causes alleged is apparent from the language of the letters, showing that her affections were alien-

ated from her husband to and by the defendant beyond all question, and tend to show criminal conversation." And again: "We think that they are both competent to show that the poison is there and that the defendant and his wife were parties to the wrong and still burning in their lust." Under this attitude, the correctness of the court's ruling in that case I think not debatable.

One other point in the Barnes case needs consideration. The supreme court in that case used the following language: "They [the letters] were not admissible under section 1881 of the Code of Civil Procedure," and cites, among others, the case of *Humphrey v. Pope*, 1 Cal. App. 374, [82 Pac. 223], decided July 25, 1905, and at a time when that section did not contain its present exception permitting a husband or wife to testify in such a case as the one at bar. The Barnes case was decided by the supreme court on February 10, 1916. The section referred to was amended, as indicated, in 1911. It is apparent, therefore, that the Cripe decision, as well as the fact that section 1881 of the Code of Civil Procedure had been so amended, was not called to that court's attention, as the court uses the specific language last above quoted, and follows the Humphrey case. In view, therefore, of the exact question which was presented to the court in the Barnes case for its decision, and confronted, as we are, with the array of facts just referred to, there is, I think, no warrant for construing that decision as in conflict with the Cripe case on the point involved and now under discussion in the case at bar. This construction is in line, in my opinion, not only with the doctrine laid down by our own supreme court, but with what seems to me the overwhelming weight of authority of this question.

Certain instructions given by the court to the jury are objected to by appellants here. "If all the instructions taken together, and not being inconsistent with each other or confusing, give to the jury a fair and just notion of the law upon the point to which they are addressed, it is sufficient." (*Weaver v. Carter*, 28 Cal. App. 241, [152 Pac. 323]; *Hamlin v. Pacific Elec. Ry. Co.*, 150 Cal. 776, [89 Pac. 1109]; *Taylor v. Pacific Elec. Ry. Co.*, 172 Cal. 638, [158 Pac. 119]; *Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, [143 Pac. 257].) Speaking generally, I think the instructions given by the court, and particularly including those to which appellants ob-

ject, ample, and as favorable to appellants as they properly could be on the questions presented. Especially is this true when the instructions objected to are considered in connection with and in the light of the other instructions given. For instance, appellants object to the following instruction given by the court to the jury: "If you should find from the evidence that the defendants, or either of them, willfully and materially enticed or induced the husband to desert and abandon the plaintiff, then you will be justified in allowing damages to plaintiff for the sake of example and by way of punishment of said defendants, or either of them, in addition to her actual damages, as to which you have already been instructed, provided the total amount shall not exceed the sum of fifty thousand dollars," on the ground that the complaint contains no prayer for punitive damages, and, hence, because of absence of any specific mention of exemplary damages in the complaint, was unwarranted. An examination of the record here discloses no evidence that an instruction on punitive damages was requested by the appealing defendants. On the contrary, it affirmatively appears, in my judgment, that the contention which is now urged by appellants is that that species of malice which was defined by the court as malice in law will not warrant an award of exemplary damages. This seems to be the first time and place that this point is raised by them. The record shows that appellants insisted all through the trial that plaintiff could not establish a right to compensatory damages except by proof of the existence on the part of the defendants of a spiteful and rancorous disposition toward the plaintiff, and that no award of punitive damages could be made in any event. No distinction was pointed out between the two. The point urged here, therefore, as is now for the first time obvious, is that the court failed to recognize this distinction. This, I think, is now unavailing to them. The rule is that a party who desires instructions to be more specific, or to incorporate distinctions not contained therein, should request such instructions or be foreclosed from complaining if he fails so to do. (*Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, [89 Pac. 976]; *Liebrandt v. Sorg*, 133 Cal. 571, [65 Pac. 1098]; *Scott v. Wood*, 81 Cal. 398, [22 Pac. 871]; *Viera v. Atchison etc. Ry. Co.*, 10 Cal. App. 267, [101 Pac. 690]; *Weaver v. Carter*, *supra*; *Hardy v. Schirmer*, 163 Cal. 272, [124 Pac. 993].)

Appellants call attention to the cases of *Hall v. Hall*, 174 Cal. 718, [164 Pac. 390], and *Van Tassell v. Heidt*, 33 Cal. App. 234, [164 Pac. 817], both having been decided since the opening brief herein was filed. In my opinion, neither of these is controlling, under the facts disclosed here. In the latter case the following is gathered from the opinion of the court: That the plaintiff brought an action against the parents of a young woman for having alienated from his wife, the plaintiff, her husband's affections. This husband had illicitly sought the regard of the young woman, but there was no sufficient evidence to support the findings and judgment against defendants. In the *Hall* case, an examination of the opinion will, I think, disclose that there was in fact no evidence to show an attempt to alienate the husband's affections. Indeed, there is a positive showing that if any such attempts had been made by them, they had wholly failed. Further, the facts disclosed by the record show that the wife in that case was the malefactor, and that she was the one who had herself abandoned her husband. She was strong on profession, but mighty short on redemption. She was very much concerned about attending "a meeting of the Young Women's Christian Association," but not much interested in applying to her daily walk and conversation the wonderful principles taught by that great, benevolent, and helpful institution. I think the court had ample basis for its statement when, in referring to the case, it said that "its evidentiary foundation is airy nothingness, not even the baseless fabric of a vision."

In the case at bar the conditions, I think, are just as much the other way. The love and affection of the husband for his wife, as disclosed by the record, continued almost, if not quite, to the date of the desertion, and the record, disregarding the statements of the young husband entirely as hearsay, contains evidence of defendants' duplicity—as I read it—the details of which need not be recited here. There is no doubt but that the rule is that the decisions require a much stronger case to be made where the defendants are, as here, the parents of the alleged alienated spouse—as is held in *Cripe v. Cripe*, *supra*, and cases there cited; but in the case at bar, in my opinion, this requirement has been fully met.

The point is made that the verdict is excessive. With this view, also, I do not agree. If the defendants wanted the verdict to sever the punitive damages, if any were awarded—as

may have been possible under the court's instructions—from the compensatory damages, they should have asked for such severance; but they are now estopped for having failed so to do. (*Davis v. Hearst*, 160 Cal. 143, [116 Pac. 530].) I am not able to conclude from the record here that the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." (*Hale v. San Bernardino etc. Co.*, 156 Cal. 713, [106 Pac. 83]; *Nolen v. Engstrum Co.*, 175 Cal. 464, [166 Pac. 346].) Damages for alienation of affections in such a case as the one at bar include the loss of aid, support, protection, comfort, and society of the husband, together with compensation for the humiliation and suffering inflicted upon the deserted wife. (Sutherland on Damages, 4th ed., sec. 1285.) It has been held that the recovery may include such elements as loss of support, and also mental anguish and disgrace. (*Nevins v. Nevins*, 68 Kan. 410, [75 Pac. 493]; *Dunham v. McMichael*, 214 Pa. St. 485, [63 Atl. 1007]; *Nichols v. Nichols*, 147 Mo. 387, [48 S. W. 947]; *Stanley v. Stanley*, 32 Wash. 489, [73 Pac. 596].) On principle, I am unable to see why there is not a much wider field for legitimate expression in such a case as this than in an action for wrongful death of a husband, for the reason (1) that in a case like the one at bar, the jury has the right to impose punitive damages, and (2) to make awards by way of solicitation for injured feelings—which concededly cannot be done in case of death—while it does embrace the same elements as in death. Judgments as large, and even larger than the one here involved, have been sustained in cases similar to the case at bar. (*Gross v. Gross*, 70 W. Va. 317, [73 S. E. 961]—twelve thousand five hundred dollars; *Lockwood v. Lockwood*, 67 Minn. 476, [70 N. W. 784]—fifteen thousand dollars; *Williams v. Williams*, 20 Colo. 51, [37 Pac. 614]—twelve thousand five hundred dollars; *Hendrick v. Bigger*, 151 App. Div. 522, [136 N. Y. Supp. 306]—thirty thousand dollars; *Speck v. Gray*, 14 Wash. 589, [45 Pac. 143]—fifteen thousand dollars; *Waldron v. Waldron* (C. C.), 45 Fed. 317—seventeen thousand five hundred dollars; *Williamson v. Osenton*, 220 Fed. 653, [136 C. C. A. 261]—thirty-five thousand dollars.) As a matter of fact, the injuries to a good wife, whose husband, theretofore loving, kind, and faithful, has been alienated from her, is, in my opinion, more serious than that of a wife whose

husband has been negligently killed. In case of death she has no humiliation, no feeling of disgrace, no injured feeling; while in a case like this, she not only has all these, but in addition thereto is sometimes subjected to suspicion and humiliation in the eyes of her friends, together with the added feeling of shame that her husband has sold her for "a mess of pottage," and has shown himself to be "yellow" through and through; all of which, to a woman who loves her husband, is far worse than to have him removed by death.

Appellants argue that if this judgment is upheld and they are called upon to pay the same, that it means the annihilation of their meager fortune at a time in life when a new start is fraught with unpromising prospects. It is to be regretted that due consideration was not given to this phase of the question by defendants before the perpetration by them of the acts disclosed by the evidence here. It is, indeed, too true that "the way of the transgressor is hard." Helen Bosanquet, in referring to "the family," said: "It is greater than love itself, for it includes, ennobles, makes permanent, all that is best in love. The pain of life is hallowed by it, the drudgery sweetened, its pleasures consecrated. It is the great trysting place of the generations, where past and future flash into the reality of the present. It is the great storehouse in which the hardly earned treasures of the past, the inheritance of spirit and character of our ancestors, are guarded and preserved for our descendants. And it is the great discipline through which each generation learns anew the lessons of citizenship, that no man can live for himself alone." The record here discloses beyond question, I think, that by the saying and doing of those things said and done, these defendants transgressed even that great solicitude which the law entertains in behalf of parents when it requires a stronger case to be made against them than is necessary to be made against a stranger, and rendered highly improbable, if at all possible, the erection, not to say the maintenance, of such a home by the husband and wife here involved.

My associates refer to the "note" left by Ralph. There was conflict in the evidence on that point. The jury resolved that conflict in favor of the plaintiff. Confronted by this fact, I fail to understand the authority of this court to interfere with the conclusion of the jury.

Reference is also made to the fact that respondent's counsel argues to this court—although not suggested in the court below—that the declarations of the husband of plaintiff to her, without the presence of the elder Mr. and Mrs. Bourne, emphasize their force as a determinative influence in the minds of the jury, etc. I think this argument of counsel unnecessary. If it be a fact, it is not so because of counsel, jury or judge, as heretofore stated.

If it be a fact that the elder Mr. and Mrs. Bourne did in fact endeavor to get their son away from his wife, then those of us who have had experience in the trial of such cases know how stealthily the disintegrating work is done and what subterfuges are resorted to. It is not the usual thing to have the strongest kind of evidence. It is well known that the sulky mood, the insolent look, the gloomy manner, etc., of the person guilty of such conduct often means as much, and sometimes more, than the overt acts or statements. That such a condition existed in the case at bar is, I think, not an unfair inference from this record. I am not unmindful of the fact that the law is very solicitous for the parents in such a case as this, and that it encourages keeping "the light in the window" for the return of the erring son or daughter. Yet this solicitude does not go so far as to countenance the willful breaking of a lamp burning in another's window that the erring child may see the light in his or her parent's window more clearly. Nor am I unmindful of the fact that sometimes in such cases as the one at bar the plaintiff is an adventuress, pure and simple, seeking, as it were, whomsoever she might devour. In this case I see nothing that even points to such a conclusion. There is, in my opinion, no evidence in this record to impugn plaintiff's motives or good faith.

That the family, as such, is the basis and the unit of society, is, perhaps, no longer questioned; that it is the foundation upon which our civilization rests is no longer debatable. That whatever undermines the integrity of the home will eventually produce the downfall of that social and political institution which we call government, is now quite generally conceded. That there is becoming more apparent each year evidences which point unerringly, it would seem, to the growing instability of the family, I think, cannot be denied. That it is challenging the attention and the serious

consideration of thinking men and women the world over is no longer a secret. The problem of the family, as I see it, is indeed the problem of the human race. The family is the most important fundamental institution of humanity. It is the great conserving agency in human society, preserving and transmitting from generation to generation both the material and spiritual possessions of the race. And yet our politicians, even our statesmen, so frequently occupied with questions of party interests, it would seem, have failed to proclaim, indeed, perhaps, to notice, the significance of the position. Shall the courts be also weighed in the balance and found wanting? God forbid! Probably no branch of our government comes into closer contact with this sacred institution—the family—than the courts. As such they have never yet failed in protecting the rights of the downtrodden and the oppressed. They insist upon the equal rights of all. They have been called, and they really are, the bulwarks of our liberties. Capital and labor both come to them; and they do not come in vain—unless with unclean hands. They will not fail to protect this greatest of all human institutions.

Marriage, by its nature, establishes social relations; hence, society is regarded as a third party thereto. This is the basis upon which the state erects its authority to define the qualifications of the persons who marry, the terms, rights, and obligations of the marriage contract, and for what causes and in what manner it may be terminated. The interest of corporate society in the institution of marriage increases in proportion as it is realized how deeply the welfare of the social organism is affected by the uniting of individuals in family relations. Whenever the fundamental importance of marriage to society as a whole is adequately recognized, there is no disposition to rail against the increasing tendency of the state to exercise the most careful surveillance over its procedure, and it becomes that our modern social development demands that in the absence of that paternal authority which characterized the colonial period of our history, the state itself should exercise a control as nearly approximating it as possible.

While this is not an action for divorce, still, while discussing the present instability of the family, and in this way supporting my argument here for the faith that I have in my conclusion in the case at bar, will it be out of place to

suggest that probably nowhere is this instability so much in evidence as in the divorce courts? If I am correct in this, then whose duty is it to call to the attention of the people generally—whose servants the courts are—the terrible moral cancer gnawing at the vitals of this institution and eventually striking at its very base? Our government, in its 1910 census, disclosed the fact that for every twelve marriages solemnized one was dissolved by the surgery of divorce; while in its report on marriage and divorce for 1916, the ratio was one to nine—an increase of twenty-five per cent in six years! According to the report last referred to, it is disclosed that the ratio of divorces to the marriages solemnized was one to every one and one-half for Nevada and one to every two and one-half for Oregon; while it is one for every five and one-half for our own state. For more than fifty years divorces have steadily increased three times as fast as the population. Between the years 1870 and 1916, both years inclusive, according to our own government reports, the number of divorces per one hundred thousand of the population was as follows: 1870, 28; 1880, 39; 1890, 53; 1900, 73; 1906, 84, and for 1916 it had gone to 112. In less, therefore, than fifty years this evidence of the instability of the family and the existence of this moral cancer on the body of society has increased, per one hundred thousand of our population, from 28 to 112, or exactly four hundred per cent. The relation of such facts in connection with a case like this may subject the author to the charge of being sensational; but he answers that the only sensational thing about it is the fact itself. It may subject him to the charge of having had something to do with turning on the light, but, under God, he is not responsible for what that light reveals.

Is not this condition destructive of the family and does it not strike at the very foundation upon which our government stands? Is it not true that the nation whose family life decays, rots at the core and dries up the springs of all social and civic virtues? Is it not un-American and erroneous to suggest that courts should ignore such facts when considering such cases as the one at bar? Is it not a matter of common knowledge among mature men and women that there is no time in the world when young people should not be interfered with in their domestic affairs like the first two or three years while they are adjusting themselves to

each other? If these questions are not impertinent or irrelevant, then it seems to me inevitable that if there was *any competent evidence* to support the verdict, that it should remain undisturbed, not only because of the interests of the parties directly involved, but also on the ground of public policy. I think there is sufficient evidence to support the verdict.

As I see it, anything that in any way—even though that be an overzealous father or mother, or both—injures, or even tends to injure or undermine the family, is inimical to the institutions of our country and the best traditions of our people. It requires no “wise men from the East,” nor those with prophetic vision, to see that, if persisted in, it is no long road that must be traveled until governments themselves fall and our vaunted civilization passes into history.

When, therefore, we are confronted with a condition of such vital public importance as disclosed by the statistics referred to, coupled with evidence such as disclosed by the record here, and the fact that awards larger than the one here involved have been sustained in this state for negligent death alone, as evidenced by the following cases: *Hale v. San Bernardino etc. Co.*, *supra*, where the award was twelve thousand dollars, and *McGrory v. Pacific Electric Ry. Co.*, 22 Cal. App. 671, [136 Pac. 303], where the award was twenty thousand dollars, I do not feel, in the face of the record here, that we should disturb the verdict of the jury or the order denying defendants’ motion for a new trial, which was the conclusion of the learned trial judge, who appears to have been extremely careful and who has conducted himself on the trial of this case in such a way as to be worthy of emulation by every trial judge in the land.

I think the appeal from the order denying defendants’ motion for a new trial should be dismissed and the judgment appealed from affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 9, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2320. Second Appellate District, Division One.—October 10, 1919.]

NORMAN B. LIVERMORE & COMPANY (a Corporation),
Appellant, v. **GUARDIAN CASUALTY & GUARANTY
COMPANY** (a Corporation), Respondent.

- [1] **APPEAL—ORDER DENYING NEW TRIAL.**—There is no right of appeal from an order denying a motion for a new trial.
- [2] **PUBLIC WORK—CONSTRUCTION OF HIGHWAY—USE OF STEAM SHOVEL—LIABILITY OF SURETY TO OWNER.**—The surety on a bond executed to the state, pursuant to the provisions of the act approved March 27, 1897 (Stats. 1897, p. 201; amended, Stats. 1911, p. 1422), for due payment to be made by the principal for all labor, materials, and supplies furnished for the construction of a portion of the state highway, is not liable to the owner of a steam shovel for the reasonable value of the use thereof in the performance of the work, where such shovel was furnished to a subcontractor by a person having possession thereof under a lease or conditional sale contract, notwithstanding the latter was in default in his payments, the owner having made no attempt to interfere with his possession of the shovel and not having given notice of the termination of the lease or contract.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank G. Finlayson, Judge. Appeal from order dismissed; judgment affirmed.

The facts are stated in the opinion of the court.

W. E. Lady, V. J. Cobb and Arthur H. Redington for Appellant.

James, Smith & McCarthy and Schweitzer & Hutton for Respondent.

CONREY, P. J.—[1] The plaintiff has appealed from the judgment and from an order denying its motion for a new trial. As there is no right of appeal from such a motion, the latter appeal will be dismissed.

[2] On the sixth day of April, 1915, Brashear-Burns Company, a corporation, as contractor, entered into an agreement with the California Highway Commission for the con-

struction of a portion of the state highway in Orange County. At the same time, and in connection therewith, the defendant Guardian Casualty & Guaranty Company, as surety, together with said contractor as principal, executed a bond to the state for due payment to be made by the principal for all labor, materials, and supplies furnished for the work of construction under the principal contract. This bond was made pursuant to the provisions of an act approved March 27, 1897. (Stats. 1897, p. 201; amended, Stats. 1911, p. 1422.)

On the fourth day of May, 1915, Brashear-Burns Company entered into a subcontract with W. S. Cook for the performance of work which was a part of the principal contract. Thereupon Cook entered into a contract with one W. F. McDowell whereby it was agreed that McDowell would furnish a certain steam shovel to be used in the performance of the work contracted to be done by Cook. That steam shovel was furnished and used in the performance of said work. Thereafter Brashear-Burns Company's contract with the state was duly completed and the work accepted. Thereafter, and within the period limited by said act of 1897, as amended in 1911, plaintiff filed a duly verified statement of claim, stating that such steam shovel was furnished by it to be used and that the same was used in the performance of the work contracted to be done by Cook under his contract with Brashear-Burns Company. This claim was filed with the California Highway Commission and conformed to the requirements of the statute. Thereupon the plaintiff, claiming to be a person coming within the class of persons for whose benefit said statutory bond was given, brought this action to recover from the defendant the amount so set forth in its verified statement of claim.

On the second day of March, 1914, the plaintiff entered into a written contract with W. F. McDowell concerning said steam shovel in substance as follows: It is stated in the instrument of contract that the plaintiff (therein called lessor) leased to McDowell (therein called lessee) the said steam shovel for a term ending February 5, 1915, for the total rental of \$4,749, of which \$750 was paid in cash on delivery of the steam shovel and the remainder was to be paid in accordance with ten installment notes of which the last was to fall due on the fifth day of February, 1915. It was fur-

ther agreed as follows: "Lessee covenants that it will keep said steam shovel in first-class repair and working order during the term of this lease; that it will not remove it from the State of California or assign this lease without the consent in writing of the Lessor, and that it will, upon the termination of this lease, return and surrender possession of said steam shovel to Lessor at San Francisco, Cal., in as good condition as when taken, ordinary wear and tear excepted. Lessor agrees that Lessee may, at the expiration of this lease, and within ten days thereafter, provided it shall have promptly and duly paid the entire rental herein specified and shall have performed all the other conditions and covenants hereof, and shall have paid for all extra parts and repairs furnished or made by Lessor during the time hereof, elect to purchase said steam shovel for the sum of One Dollar, and if Lessee so elects and so notifies Lessor, said steam shovel shall, upon payment of said sum, become and be the property of the Lessee and Lessor will execute a bill of sale thereof. In case of any breach of this agreement by the Lessee, arising by failure of said Lessee to pay rent as the same becomes due, or otherwise, the lessor may, at his option, forthwith terminate this lease, and may enter upon the premises of the Lessee and retake possession of the said steam shovel wherever found, and said Lessee hereby agrees to said Lessor's entry and retaking possession, and releases said Lessor from any cause of action which the Lessee might otherwise have on account of said entry or removal or retaking of possession."

It will be noted that in May, 1915, when McDowell agreed with Cook for the furnishing of the shovel to be used in the performance of the Cook contract, the specified term named in the contract between plaintiff and McDowell had expired. McDowell was then delinquent in his payment to plaintiff to the extent of more than one-half of the total rental or price therein named. The evidence further shows, however, that the plaintiff had made no attempt to interfere with McDowell's possession of the shovel and had not given any notice of termination of the lease or contract. Prior to this time and while delinquent in payments on the contract, McDowell had used the shovel on two other contracts. In each of those instances he had made arrangements with the person by whom the shovel was used whereby they made pay-

ments to the plaintiff for account of McDowell. That was done with the consent of the plaintiff, although it is not clear from the terms of the contract that any such consent was necessary. In like manner, when McDowell entered into his contract with Cook it was made a part of their agreement that during the time that the shovel was used upon that contract, the Brashear-Burns Company should deduct from the moneys payable to Cook the sum of four hundred dollars per month and pay the same to the plaintiff. Thereupon Cook, on the fifth day of May, 1915, executed a written order to Brashear-Burns Company directing that it pay to the order of the plaintiff the sum of four hundred dollars per month during the time that the shovel was used on the said highway work, said payments to be charged against the money due Cook from Brashear-Burns Company. An acceptance of that order was indorsed thereon, on the same day, signed "Brashear-Burns Company, By F. J. Truman, Secretary." None of the moneys mentioned in this order were paid. The evidence shows without dispute that the reasonable value of the use of the shovel was four hundred dollars per month. The controversy herein relates, not to the amount of the claim, but goes to the question of any liability at all of the defendant as surety on said bond.

The liability of defendant as surety on the bond executed by it cannot be maintained by plaintiff by proving that the shovel, used as it was in the described work, was furnished by McDowell. Yet in fact that is the effect of the evidence. And we think there is no merit in appellant's contention that in bringing the shovel to the place of work, for use therein, McDowell was acting as agent for the plaintiff. Counsel have debated the question whether the "lease" contract between plaintiff and McDowell was a lease, or was a conditional sale. That question need not be decided. If the contract was one of conditional sale, it remained in force by manifest intention of the plaintiff, which had never demanded or attempted to recover possession. If the contract was only a "lease" or bailment, then McDowell was a bailee holding over after expiration of the time limited in the lease, and liable to his lessor as such bailee. Under either interpretation, he held possession of the shovel in his own right and not as agent for the plaintiff. The evidence well supports

the court's finding that it was not furnished to Cook by the plaintiff.

The appeal from the order is dismissed. The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court December 9, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2995. First Appellate District, Division One.—October 11, 1919.]

D. McDOUGALL, Administrator, etc., Appellant, v. C. WESLEY ROBERTS et al., Respondents.

- [1] **UNDUE INFLUENCE—DISPOSITION OF PROPERTY—INADEQUATE CONSIDERATION—REMEDY.**—Where a person through undue influence has been induced to part with his property for an inadequate consideration, his remedy is rescission and not damages; and prompt rescission and offer of restitution are essential to a recovery.
- [2] **FRAUDULENT REPRESENTATIONS—UNTRUTH OF STATEMENTS—PLEADING.**—In an action for damages for fraudulent representations, it is essential that the statements made by the defendant be alleged to be untrue. An inference is not a sufficient allegation of falsity.
- [3] **ID.—ATTORNEY AND CLIENT—ADVICE TO DISPOSE OF PROPERTY—EXPRESSION OF OPINION.**—A statement by an attorney to a client, who is not capable physically or mentally of giving his business ordinary care and attention due to cares and worries of a vexing and harassing nature growing out of certain litigation, that it is for the best interest of the latter that he at once dispose of all his property, is insufficient to constitute a misrepresentation as distinguished from a mere opinion.

3. What statements are fact and what opinion, note, 35 L. R. A. 435.

- [4] **ID.—INDICTMENT OF PLAINTIFF—INFLUENCE OF DEFENDANTS TO PREVENT—WANT OF ALLEGATION OF FALSITY.**—Allegations that the defendants represented to plaintiff that he was about to be indicted by the grand jury and that they had great influence with the United States district attorney, and could, through him, either cause or prevent an indictment being found against plaintiff, are insufficient to state a cause of action for fraud where it is not alleged that such statements were untrue.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. F. Oster and Peyton H. Moore for Appellant.

C. S. Anderson, R. L. Horton, Hunsaker & Britt, Le Roy M. Edwards, Stephens & Stephens and James E. Degnan for Respondents.

KERRIGAN, J.—The complaint herein presents an action for damages based upon the fraud of defendants, one of whom was plaintiff's attorney. It recites, in substance, that while plaintiff was sick in body and mind he was induced to transfer for a consideration of less than one hundred thousand dollars real and personal property worth \$1,403,060. The complaint was filed about a year and a half after the transaction occurred, and was in three counts. The trial judge sustained defendants' demurrer to the first and second counts of the second amended complaint, without leave to amend. As to the third count he granted plaintiff leave within fifteen days after notice to apply to the court on five days' notice for leave to file an amended third count. In accordance with the leave so granted plaintiff served and asked leave to file his third amended complaint. The motion to amend was opposed by defendants upon the ground, among others, that the proposed complaint did not state facts sufficient to constitute a cause of action; that said motion was not made in good faith, and that the allegations of the proposed amended complaint were sham and false.

Upon the hearing defendants offered and the court received in evidence, without objection, the original complaint, the first and second amended complaints, together with the demurrers and answers thereto, and also the deposition of

plaintiff, which had been taken and was on file. After argument and before decision plaintiff withdrew his proposed complaint and asked for and received permission of the court to submit a further amended pleading. Thereafter plaintiff served an amended pleading, which he styled "third amended complaint," and moved for leave to file it. Defendants objected thereto, urging in opposition all of the objections they had theretofore made to the filing of an amendment. Permission to file the amended document was denied by the court upon the ground, among others, that the proposed complaint did not state facts sufficient to constitute a cause of action, that the alleged cause of action was barred by the statute of limitations, and that said motion was not made in good faith, and that the allegations of the proposed amended complaint were sham and false. Judgment followed for defendants, and plaintiff now takes this appeal.

As grounds for reversal it is urged, first, that the trial court erred in sustaining the demurrers to the second amended complaint and in rendering judgment of dismissal thereof; and, second, the trial court erred in denying plaintiff's application to file his proposed third amended complaint.

As stated by counsel for appellant, the main question here involved is as to whether or not the second amended complaint and the proposed third amended complaint state facts sufficient to constitute a cause of action, for the allegations contained in these two documents are substantially the same. In passing upon the demurrers of the defendants to plaintiff's second amended complaint the trial judge filed an opinion, which has been made a part of the record herein. As we think it correctly states the law with reference to the questions presented on this appeal, we hereby adopt it as the opinion of this court. It is as follows:

"This case is before the court upon the demurrers of the defendants to plaintiff's second amended complaint. The injury complained of by plaintiff is that defendants have secured from him property worth \$1,403,060 for the sum of one hundred thousand dollars 'and other considerations,' including the assumption of debts of plaintiff, to plaintiff's damage in the sum of \$1,310,560. The complaint is in three counts. [1] It is conceded by defendants that the facts stated in each count sufficiently allege undue influence, but it is claimed that the remedy therefor is rescission and not

damages. It was so held by our supreme court in *Bancroft v. Bancroft*, 110 Cal. 379, [42 Pac. 896]. Prompt rescission and offer of restitution are essential to a recovery on the ground of undue influence. Neither is alleged in the complaint, and hence the complaint fails to state a cause of action for undue influence. Plaintiff argues that this restitution is unnecessary, citing *Moore v. Moore*, 133 Cal. 489, [65 Pac. 1044, 66 Pac. 76]. This case is discussed in *Henry v. Phillips*, 163 Cal. 135, 143, [Ann. Cas. 1914A, 39, 124 Pac. 837], and does not apply to the case at bar. [2] Plaintiff claims, however, that the complaint states a cause of action for fraudulent representations. Omitting certain allegations in the complaint as to what the defendants conspired to do, and assuming that the alleged representations are statements of fact, it is not alleged that the said statements were in fact untrue, or that they were known to defendants to be untrue. In the first count the alleged misrepresentation is 'that if he (the plaintiff) did not sell all of his stock to the defendants he would be subjected to a criminal prosecution' 'upon a criminal charge in the United States district court of the southern district of California.' It is not alleged that this statement was untrue, and treating it as an actionable misrepresentation, rather than a mere expression of opinion (for which no action would lie) it is essential to a plea of false representation that it be alleged to be untrue.

[3] "In the second count the alleged misrepresentation is that defendants 'did . . . represent that it was to plaintiff's best interest that plaintiff at once dispose of all his real property,' etc. It is claimed that while ordinarily such a statement as this would be but an expression of opinion, in this case, where such statement is made to plaintiff by his attorney, he had a right to rely thereon and to treat the same as a statement of fact (citing *Phelps v. Grady*, 168 Cal. 73, [141 Pac. 926]; *Henry v. Continental etc. Assn.*, 156 Cal. 667, [105 Pac. 960]). Assuming that this statement comes within the principle of these cases, it is nowhere alleged that this statement or advice was untrue. Inferentially it may be so alleged as growing out of the vast disproportion between the value received and given, but an inference is not a sufficient allegation of falsity. It is alleged in another count that the 'plaintiff was engaged in a large amount of

litigation connected with his interest in the said Conservative Investment Company (the corporation whose stock was transferred by plaintiff to defendants) and had been subjected to many business cares and worries of a vexing and harassing nature growing out of such litigation, and because thereof he was not physically or mentally capable of devoting to the affairs of his said business or to the management of his interests and real property or his said stock in said Conservative Investment Company, ordinary care or attention.' While this allegation is for the purpose of showing plaintiff's susceptibility to undue influence or fraud, it nevertheless serves to show that the defendant attorney might have stated the truth when he said that it was for the best interest of a man who was losing his mind and health over litigation to sell his interest in the property involved therein. The quotation is made here merely to enforce the principle that the untruth of the alleged representation must be alleged in order to effectively allege fraud. However, we think the allegation is one of a mere opinion so general in its nature as to be insufficient to constitute a misrepresentation as distinguished from a mere opinion.

[4] "The third count alleges a representation 'that plaintiff was about to be indicted by the said grand jury . . . that defendants had great influence with said United States district attorney and could, through him, either cause or prevent an indictment being found against plaintiff,' and that if plaintiff did not sign the papers involved herein he would be indicted by said grand jury, and if he did he would not be so indicted. This could be but the expression of an opinion except as to the statement 'that he was about to be indicted' and that one of the defendants had great influence with the said United States district attorney. It is not alleged that these statements were untrue; and while undue influence may be predicated thereon, the falsity of the statements or opinions must, as has already been said, be alleged in order to base thereon an action at law for fraud.

"These three counts therefore fail to state a cause of action.

"It is claimed by the plaintiff that he has stated a cause of action because of the alleged misconduct of plaintiff's attorney and the active participation of the other defendants therein. That such conduct would justify an action for rescission is admitted; that it would justify an action to

recover secret profits is admitted also, or cannot be denied. But, as has been said, the complaint fails to allege restoration or an offer to restore, and hence fails as an action for rescission; and while alleging that the attorney has a one-tenth interest in the purchasing syndicate, it fails to allege any profit therefrom and does not purport to ask for an accounting of profits realized. It is worthy of observation, too, that the contract set up by the plaintiff affirmatively shows on its face that the said attorney had an interest in the subject matter of twenty-six thousand five hundred dollars separate and distinct from his interest as an attorney for plaintiff, and while the plaintiff alleges that he was ignorant that his attorney would be one of the purchasing syndicate, he was not ignorant that said attorney had an interest in the contract adverse to him. For the reason stated the complaint fails to state a cause of action against said defendant.

"As to defendant Roberts, the plaintiff claims special injury because he demanded and received a commission of two thousand five hundred dollars. Aside from the allegations of plaintiff's mental weakness (not amounting to incompetency) there seems to be no basis for the recovery of this amount. The defendant demanded the compensation, and the plaintiff, knowing all the facts, paid him. He cannot recover.

"... In the event that no application is made for leave to amend as herein provided, or if said leave be denied, judgment will go for defendants."

Respondents insist that the record as presented does not entitle appellant to a review of the judgment. Considering the conclusion we have reached, this point becomes unimportant.

For the reasons given the judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 2981. First Appellate District, Division One.—October 11, 1919.]

C. W. FOX, Appellant, v. ALEX T. CRANE, Respondent.

- [1] **PROMISSORY NOTE—PROVISION FOR ATTORNEY'S FEES—NEGOTIABILITY OF INSTRUMENT.**—A provision in a promissory note that "should an attorney be employed to enforce the payment of this note, we agree to pay an additional sum of one per cent on principal and accrued interest as attorney's fees," does not render the note non-negotiable.
- [2] **ID.—PROVISION FOR INCREASED INTEREST AFTER MATURITY—NEGOTIABILITY OF INSTRUMENT.**—A provision in a promissory note payable one year after date that the interest thereon is to be "payable annually, and if not so paid to be compounded and bear the same rate of interest as the principal; and should the interest not be paid when due then the whole sum of the principal and interest shall become immediately due and payable at the option of the holder," does not render the note non-negotiable.
- [3] **ID.—RECEIPT OF NOTE IN PAYMENT OF PROPERTY—ACQUISITION IN ORDINARY COURSE OF BUSINESS.**—Promissory notes received before maturity, without notice or knowledge of any claim of the makers that they have a defense thereto, in part payment for certain real property, are acquired in the ordinary course of business and for a valuable consideration.
- [4] **ID.—"USUAL COURSE OF BUSINESS"—MEANING OF TERM.**—As applied to commercial paper, the term "in the usual course of business" means the delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it when offered for the purpose for which it was transferred.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Reversed.

The facts are stated in the opinion of the court.

Sweet, Stearns & Forward for Appellant.

E. S. Torrance for Respondent.

1. Negotiability of note containing stipulation for attorneys' fees, note, Ann. Cas. 1912D, 165.

2. Negotiability as affected by provision in relation to interest or discount, note, 2 A. L. R. 139.

KERRIGAN, J.—This action was brought by plaintiff, appellant herein, to recover judgment on a promissory note for five thousand dollars, dated May 13, 1913, executed by defendant Alex T. Crane, and made payable one year after date to the order of C. W. McKee and Kit Carson, defendants herein. Before maturity the note was indorsed and delivered to appellant, together with three other promissory notes, the four notes amounting to the sum of fourteen thousand five hundred dollars. These notes were transferred by defendant Crane to plaintiff in payment for certain real property situated in the city of San Diego. To secure their payment a declaration of trust was entered into by the parties, under which the property was conveyed to a certain trust company, to be held by it in trust and until the notes were paid, or to be sold by the company in the event of the nonpayment thereof. For failure to pay two of the notes when they became due the trust company sold the real property as provided by the terms of the declaration of trust.

As a defense to the note sued upon defendant claimed that it was non-negotiable and that he had been induced to execute the same through fraud on the part of the payees. Plaintiff claimed, however, that the note had been transferred to him before maturity in due course and for a valuable consideration, and that the defense of fraud could not be set up as against him. The trial court found the instrument to be negotiable, and that the plaintiff had acquired it before maturity, duly indorsed, in good faith, and without any notice, information, or knowledge whatever of any claim of defendant that he had any defense thereto; but further found that defendant was induced to sign it by fraud, and that plaintiff did not acquire it in the usual course of business or for a valuable consideration, and accordingly rendered judgment in favor of defendant Crane. Judgment went against Carson by default.

The principal contention in the court below related to the question as to whether or not the instrument sued upon was a negotiable promissory note. Defendant claimed that it was non-negotiable by reason of certain conditions therein contained. The finding of the trial court being against him upon this question, he presents the same objection here.

The note reads as follows:

"\$5,000.00.

San Diego, Cal., May 13, 1913.

"On or before one year after date, for value received, we or either of us promise to pay to the order of C. W. McKee at the Merchants' National Bank of San Diego, the sum of \$5,000.00 with interest thereon at the rate of 7% per annum from date until paid, payable annually, and if not so paid to be compounded and bear the same rate of interest as the principal; and should the interest not be paid when due then the whole sum of the principal and interest shall become immediately due and payable at the option of the holder of this note. All payable in U. S. gold coin, and should suit be commenced or an attorney be employed to enforce the payment of the note we agree to pay an additional sum of one per cent on principal and accrued interest as attorney's fees in such suit.

"ALEX. T. CRANE,

"KIT CARSON."

[1] Two reasons are urged by respondent in support of his contention that the note is not a negotiable instrument. The first of these is that the provision, "Should an attorney be employed to enforce the payment of this note, we agree to pay an additional sum of one per cent on principal and accrued interest as attorney's fees," brings about this result. This contention is based upon the construction given to a similar provision by our supreme court in *Adams v. Seaman*, 82 Cal. 636, [7 L. R. A. 224, 23 Pac. 53]. Since the rendition of that decision the statute has been changed so as to admit of a condition with reference to attorney's fees. Considering the changed condition of the statute, we fail to see how the reasoning in that decision has any application to the instant case.

In *Glen v. Rice*, 174 Cal. 269, [162 Pac. 1020], the identical condition here involved was contained in the note there sued upon, and the note was held to be negotiable in form. It is claimed, however, that the objection here raised, viz., that the condition complained of admits of an interpretation that an attorney would be entitled to a fee even though he did not bring suit, was not urged in that case, and for that reason the decision is not authority upon the question. The question of the character of the note was before the court and was passed upon and is decisive of this question.

[2] The second reason urged against the negotiability of the note relates to the provision allowing compound interest after maturity, the presence of this provision being claimed to have the effect claimed in support of which contention we are cited to the cases of *Cornish v. Wolverton*, 32 Mont. 456, [108 Am. St. Rep. 598, 81 Pac. 4], *Hegeler v. Comstock*, 1 S. D. 138, [8 L. R. A. 393, 45 N. W. 335], *Rudolph v. Hudson*, 12 Okl. 516, [74 Pac. 946], and *Bracken v. Fidelity Trust Co.*, 42 Okl. 118, [L. R. A. 1915B, 1216, 141 Pac. 6]. The note sued upon in *Cornish v. Wolverton*, *supra*, presents a different question. There the interest on the note was payable semi-annually and the note did not mature for five years. In the instant case the interest was payable annually, and as the note was payable one year from date, no interest would be due until the maturity of the note. *Hegeler v. Comstock*, *supra*, was not followed in the later case of *Merrill v. Hurley*, 6 S. D. 592, [55 Am. St. Rep. 859, 62 N. W. 958], and *Rudolph v. Hudson*, and *Bracken v. Fidelity Trust Co.* are both expressly overruled in the later case of *Bank v. Gleichmann*, 50 Okl. 441, [L. R. A. 1915F, 1203, 150 Pac. 908]. In the case last cited the cases are reviewed and the conclusion reached that the decided weight of authority is to the effect that a provision in a note for an increased rate of interest after maturity, in case of default, does not introduce such uncertainty of amount into the instrument as to impair its negotiability. (See, also, note in 125 Am. St. Rep. 204, and *Glen v. Rice*, 174 Cal. 269, [162 Pac. 1020].)

For the reasons given we conclude that the court correctly determined that the note was negotiable.

[3] We are of the further opinion, however, that the evidence fails to support the findings of the trial court that the appellant did not acquire the note in the ordinary course of business, and that he did not acquire it for value or pay a valuable consideration for the transfer and delivery thereof from McKee to himself. The evidence upon this subject is without conflict. Appellant owned and sold his land in San Diego to McKee for the sum of fifteen thousand dollars. Five hundred dollars was paid in cash and the balance by four promissory notes, two of which were signed by defendant McKee as maker, and the remaining two by defendants Crane and Carson, as makers, in favor of defend-

ant McKee and indorsed by him and delivered to plaintiff at the time the contract of purchase was made. No fraud on the part of plaintiff is charged. The evidence of defendant Crane himself affirmatively shows that plaintiff visited him and informed him of the transaction, and asked him if the notes were good, and was informed by Crane that they were and that he had signed them. Under these circumstances we fail to see how the notes were not acquired for value and in the usual course of business. [4] As applied to commercial paper, the term "in the usual course of business" means the delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it when offered for the purpose for which it was transferred. (2 Raad on Commercial Paper, sec. 988.) And one who receives a note in exchange for real property acquires it in the usual course of business (*Cunningham v. Holmes*, 66 Neb. 723, [92 N. W. 1023]).

Here there is no claim, and the evidence presents no facts which show any fraud or lack of fair dealing on the part of plaintiff. He suffered a detriment by being deprived of a right to dispose of his land during the time the property was held in trust.

We conclude, therefore, that the note was acquired by plaintiff for value and in the usual course of business, and without any notice of fraud, and before its maturity.

For the reasons given the judgment appealed from is reversed.

Richards, J., and Waste, P. J., concurred.

[Crim. No. 682. Second Appellate District, Division One.—October 13, 1919.]

In the Matter of the Application of JOHN N. LOWRIE
for a Writ of Habeas Corpus.

[1] **CRIMINAL LAW—SUFFICIENCY OF COMPLAINT—LOTTERY—GAMING.—**

While the facts alleged in the complaint under review in this proceeding on *habeas corpus*, in which the petitioner was charged with conducting a lottery for the distribution of property by chance, raffle, and gift enterprise, did not constitute a lottery within the meaning of section 319 of the Penal Code, the acts with the commission of which the petitioner was charged did constitute a misdemeanor as defined by section 330 of said code, under chapter 10 thereof, entitled "Gaming."

[2] **ID.—BANKING GAME DEFINED.—**A banking game is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost.

[3] **ID.—SALE OF CHIPS — BETTING — THROWING OF DICE — BANKING GAME.—**A person engaged in conducting a game wherein, to anyone wishing to play the same, he sells ten white chips for a dollar, one or all of which chips each of the purchasers might lay upon the table as a bet and in each case the person conducting the game covering the bet by a like number of chips, he to then throw the dice from the box, followed by the others doing likewise, the result of which determines who loses or wins, the bets being paid accordingly, all chips won by the person conducting the game going into a common fund kept by him, called the bank, and out of which he pays all losses, is conducting a banking game.

[4] **ID.—PLAYING FOR CHIPS REDEEMABLE IN MERCHANDISE—VIOLATION OF STATUTE.—**A person conducting a banking game played for chips, each of which has a definite monetary value and is redeemable at such value by the person conducting the game, in merchandise selected by the winner of the chips, is guilty of an offense under section 330 of the Penal Code.

[5] **ID.—STATUTE NOT REPEALED BY IMPLICATION.—**There is nothing in section 330a of the Penal Code upon which to claim a repeal by implication of the provisions of section 330 of said code.

PROCEEDING on Habeas Corpus to test the sufficiency of a complaint to charge an offense. Writ discharged and petitioner remanded to custody.

The facts are stated in the opinion of the court.

John S. Cooper for Petitioner.

Thomas Lee Woolwine, District Attorney, and Bonner Richardson, Deputy District Attorney, for Respondent.

SHAW, J.—*Habeas corpus*. At the time of the issuance of the writ herein petitioner was imprisoned under a complaint charging him with conducting a lottery or scheme for the distribution by chance of property to the complainant, and the public, for which chances valuable considerations were paid, and which alleged unlawful scheme was conducted "in the manner following and no other, to wit: In that the said defendant, John N. Lowrie, did have five dice and a cup, which said dice were dice having six bases or faces and no more, and which dice were in the form of cubes with the faces thereof numbered consecutively from one to six, and were used in the following manner in the conducting of said lottery: That complainant James F. Smith and the public were invited to engage in said lottery, and to play the same; that complainant paid to defendant the sum of One Dollar and received therefor from said defendant ten white chips; that complainant laid one of the chips upon the board and the other players engaged therein did likewise; that the defendant then threw the dice and when the dice were exposed, said defendant counted the number of pairs and there were one pair of fours (4s); the defendant then handed the cup and dice to complainant, who thereupon threw the dice and there was exposed upon the upper side one pair of sixes (6s); that thereupon defendant handed to complainant a white chip of the same kind that he had purchased. Then the cup was handed to the other players, who did throw the dice, and who won and lost, and when each player lost, the defendant took a white chip, and when each player won the defendant gave the player a white chip. In some instances a player would place upon the board more than one chip, and when he won the defendant would give to him an equal number of chips, and when he lost the defendant would take all the chips deposited by the player upon the board. When the player had finished playing the game he was invited by the defendant to surrender his chips

and receive therefor merchandise only to the value of his chips, each chip being computed at ten cents and merchandise distributed to each winner by defendant; and if the player had no chips he received nothing. Which said scheme for the distribution of property by chance, raffle and gift enterprise is designated and known as Razzle Dazzle."

[1] The greater part of the argument of counsel is devoted to the question as to whether the complaint charges defendant with conducting a lottery as defined by section 319 of the Penal Code, in the chapter designated as chapter 9 and entitled "Lotteries," as claimed by respondent and with which contention petitioner takes issue. Under our view of the case it is unnecessary to discuss the points made for and against this proposition by the respective parties or to review the many authorities cited by each in support of his contention. Suffice it to say that, in our opinion, the facts alleged, and which we have fully set out, do not constitute a lottery within the meaning of the statute. Nevertheless, we are of the opinion that the acts with the commission of which defendant is charged constitute a misdemeanor as defined by section 330 of the Penal Code, under chapter 10 thereof, entitled "Gaming." This section provides that "every person who deals, plays, or carries on . . . or who conducts . . . any game of faro . . . or any banking . . . game played with cards, dice, or any device, for money, checks, credits, or other representative of value, . . . is guilty of a misdemeanor, . . ." [2] A banking game, as defined in *People v. Carroll*, 80 Cal. 153, [22 Pac. 129], "is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost. The fund which is provided for that purpose is generally called the bank, and the person who conducts it the banker." And in *Shaw v. State*, 35 Tex. Cr. Rep. 394, [33 S. W. 1078], it is said, in effect, that where a person threw the dice, took the bets, stood behind the table, and was one against many, he was the dealer of the game, and hence the game was a banking game. [3] From the allegations of the complaint it clearly appears that defendant was engaged in conducting a game wherein, to anyone wishing to play the same, he sold ten white chips for a dollar, one or all of which chips

each of the purchasers thereof might lay upon the table as a bet and in each case the defendant covered the bet by a like number of chips. He then threw the dice from the box, followed by the others doing likewise, the result of which determined who lost or won, and the bets were paid accordingly. All chips won by defendant went into a common fund kept by him, called the bank, and out of which he paid all losses. That it was a banking game we entertain no doubt. (*Ex parte Williams*, 7 Cal. Unrep. 301, [87 Pac. 565].)

[4] Conceding the character of the game as stated, petitioner properly claims that under section 330 of the Penal Code, he could not be guilty of an offense unless it was "played for money, checks, credits, or other representative of value," none of which terms, he insists, can be said to include the white chips constituting the stakes played for in the instant case; in support of which contention he cites the *Williams* case, *supra*. In that case a slot machine was used by the defendant's customers in gambling for cigars and tobacco, and while the court held that it constituted a banking game, it was also held that cigars were not moneys, checks, nor credits, nor were they included within the term "other representative of value"; and hence the acts with which *Williams* was charged did not constitute an offense within the meaning of the statute. We may concede the correctness of the court's conclusion in that case. The game which defendant is charged with conducting was not played for cigars or other merchandise, but for chips, each of which under the agreement and scheme represented the value of ten cents and was redeemable at such value by the defendant as banker, in merchandise selected by the winner of the chips, and hence they were representative of the value of the merchandise so received in exchange therefor. Had the chips been redeemable in money of the realm, it seems, under the decisions in the *Williams* case and *People v. Carroll*, *supra*, there would be no question as to the acts alleged constituting an offense. But the merchandise given in exchange for the chips must be deemed of value and the value of the goods which, in accordance with the scheme, were given in exchange for the chips won was represented by the chips, possessing no intrinsic value whatever. Hence, conceding the correctness of the *Williams* case, wherein it was held that

the cigars constituting the stakes were not representative of value, it is distinguishable from the facts in the present case in that the chips played for were, under the scheme and agreement, intended to and did represent ten cents each in value, to be paid for and redeemed in merchandise.

[5] There is nothing in section 330a of the Penal Code upon which to claim a repeal by implication of the provisions of section 330.

The writ is discharged and petitioner remanded to the custody of the sheriff of Los Angeles County.

Conrey, P. J., and James, J., concurred.

[Civ. No. 3108. Second Appellate District, Division One.—October 13, 1919.]

E. O. LEAKE, Respondent, v. CITY OF VENICE
(a Municipal Corporation), et al., Appellants.

FRED L. ALLES etc., Respondent, v. CITY OF VENICE
(a Municipal Corporation), et al., Appellants.

BRAUN, BRYANT & AUSTIN (a Corporation), Respondent,
v. CITY OF VENICE (a Municipal Corporation), et al.,
Appellants.

- [1] **APPEAL—TIME—EXTENSION OF.**—Under section 939 of the Code of Civil Procedure, the sixty-day limit of time for appealing from a judgment cannot be extended, except by the pendency of proceedings on motion for a new trial.
- [2] **NEW TRIAL—NOTICE OF INTENTION—SIGNATURE BY ATTORNEY NOT OF RECORD—WAIVER OF OBJECTION.**—Where the attorneys for the plaintiffs are served with copies of a notice of intention to move for a new trial, and an acknowledgment of receipt thereof is given on the original, without seasonable objection, they cannot later be heard to deny the validity of such notice because it is not signed by the attorney of record, but by another attorney who has been requested by the attorney of record and the defendants to become an attorney of record, but who, through inadvertence in signing the notice, signed his own name alone.
- [3] **ID.—FAILURE TO SIGN NOTICE OF INTENTION—DEFECT NOT JURISDICTIONAL.**—While the law requires that notices of intention to move for a new trial be signed, failure to observe this requirement does not establish a defect of jurisdiction.

MOTION to dismiss appeals from judgments of the Superior Court of Los Angeles County. Russ Avery, Judge. Denied.

The facts are stated in the opinion of the court.

C. E. McDowell and E. B. Coil for Appellants.

Goudge, Robinson & Hughes and E. O. Leake for Respondents.

CONREY, P. J.—Respondents move to dismiss the appeals from the judgments herein, on the ground that no appeal was taken until more than sixty days after entry of judgment in each of the three cases included in the consolidated record on appeal; it being contended by respondents that no proceeding on motion for new trial was pending at any time in either of said actions. [1] Under section 939 of the Code of Civil Procedure, the sixty-day limit of time for appealing from a judgment cannot be extended, except by the pendency of proceedings on motion for a new trial. The records on which the motion to dismiss is based are alike in the several cases.

[2] At and before the time of entry of the judgments, C. E. McDowell was the sole attorney for appellants. Within the time required by law, a notice of intention to move for a new trial was, in each case, served and filed. These were sufficient in all respects, unless they were void by reason of the fact that they were signed by E. B. Coil as attorney for defendants and not by C. E. McDowell. As shown by affidavits contained in the bill of exceptions, Coil had been requested by McDowell and by the defendants to become an attorney of record for defendants in the action, together with McDowell, and had been authorized on behalf of both McDowell and the defendants to sign the notices. By an oversight, due only to inadvertence, Coil omitted to use the name of McDowell in the notices, and signed them by his own name alone. At that time no formal substitution of attorneys, conforming to the requirements of the Code of Civil Procedure (section 284), had been made. When those notices were served on the attorneys of the plaintiffs, they indorsed thereon acknowledgments of receipt of copies, and made no

objection to the notices at that time. When the motions for new trials were about to be heard by the court (that being long after the time within which notice of intention to move for a new trial could have been given), the plaintiffs for the first time suggested that the notices of intention were insufficient because not signed by the attorney of record.

So far as respondents are concerned, the situation is not different from that which would have existed if McDowell himself had prepared and served the notices, but had inadvertently omitted to sign his name thereto. For the notices were in fact the intended act of McDowell and of his clients. This being so, the physical fact of signature on the paper was merely a mode of identification, required for the benefit of respondents, which they might waive. Having received the copies and given acknowledgment of receipt thereof, without seasonable objection, respondents should not later be heard to deny the validity of notices so given. (*Livermore v. Webb*, 56 Cal. 489.) [3] While the law requires that such notices be signed, failure to observe this requirement does not establish a defect of jurisdiction, any more than in the case of a complaint filed without signature. But the omission of the signature to a complaint does not make the pleading a nullity. (*Canadian Bank v. Leale*, 14 Cal. App. 307, [111 Pac. 759].)

The motion to dismiss is denied.

Shaw, J., and James, J., concurred.

[Civ. No. 3034. First Appellate District, Division Two.—October 14, 1919.]

BRADFORD BAKING COMPANY (a Corporation),
Appellant, v. **WEBER BAKING COMPANY**, Re-
spondent.

[1] **TRADE NAME—USE OF TO PROMOTE UNFAIR COMPETITION—INJUNCTION.**—A name or mark of such a nature that no one may acquire an exclusive right to its use, and which cannot become a trade-mark, may become a trade name and the use of it to promote

1. Use of personal or corporate trade name as unfair competition, notes, 2 Ann. Cas. 415; 16 Ann. Cas. 596.

unfair competition may be prevented or redressed; and as against a particular defendant using the name upon a similar product, it is only necessary to show such facts as to put in operation the rules governing unfair competition. It is not necessary that the defendant should have duplicated the label used by the plaintiff before relief may be had.

- [2] **ID.—USE OF WORDS “GERMAN TOAST” ON BREAD WRAPPERS—UNFAIR COMPETITION—INJUNCTION.**—In this action brought to enjoin the defendant from using the words “German Toast” upon wrappers used on bread manufactured by the defendant, the court should have found from the admitted facts and the exhibits in evidence that the plaintiff had acquired the right to the use of the term as a trade name for its bread as against the defendant, and that the defendant was guilty of unfair competition in the use of its said label upon its bread; and an injunction should have been granted restraining the defendant from using the said wrappers on the bread manufactured and sold by it.
- [3] **ID.—VOLUNTARY ABANDONMENT OF USE OF NAME—RIGHT TO INJUNCTION.**—In such an action the plaintiff is entitled to an injunction notwithstanding the defendant has voluntarily abandoned the use of the label in question.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Reversed.

The facts are stated in the opinion of the court.

Richard A. Dunnigan for Appellant.

Clyde E. Cate for Respondent.

LANGDON, P. J.—This is an appeal from a judgment for the defendant in an action brought to enjoin the defendant from using the words “German Toast” upon wrappers used on bread manufactured by the defendant. The action was based upon the ground that the words “German Toast” had been copyrighted by plaintiff, and upon the further ground that the use of these words by the defendant upon its wrappers was with the fraudulent intent to injure and divert the business of the plaintiff and to deceive and mislead previous purchasers and consumers of the plaintiff’s bread. At the time of the trial the parties stipulated that all the facts set forth in the complaint were true, except that defendant specifically denied that the name “German Toast” was susceptible of being appropriated as a trademark, and

also specifically denied that the wrappers used by the defendant are similar to those used by the plaintiff, and also denied that said wrappers used by the defendant are such wrappers as would have a tendency to deceive the public or to cause the public to believe that the bread manufactured by defendant was the same bread sold by the plaintiff. No evidence was introduced other than the wrappers used by the plaintiff and the defendant. The appellant urges two points for a reversal: First, that the words "German Toast" were the subject of registration and were registered by the plaintiff, who thereby acquired a property right in the same, and, second, that even though the first contention be unsound, yet the plaintiff had used its label and trade name for about four years and built up a demand for the product so designated before the defendant applied the name to its product, and that the defendant was guilty of a fraud in using this name subsequently with reference to a product of the same character as the product of the plaintiff.

It is not necessary for us to decide here whether the words "German Toast" are words in which the plaintiff may acquire a property right as a trademark; [1] because a name or mark of such a nature that no one may acquire an exclusive right to its use, and which cannot become a trademark, may become a trade name and the use of it to promote unfair competition may be prevented or redressed. (38 Cyc. 684; *Schmidt v. Breig*, 100 Cal. 672, [22 L. R. A. 790, 35 Pac. 623]; *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 535, 536, [50 Am. St. Rep. 57, 30 L. R. A. 182, 42 Pac. 142].) As against a particular defendant using the name upon a similar product, it is only necessary to show such facts as to put in operation the rules governing unfair competition. The facts bearing upon this question which were alleged in the complaint and admitted by the stipulation are that the plaintiff and its predecessors in interest have continuously, since the twentieth day of March, 1913, been the manufacturers and venders of bread, and that said plaintiff and its predecessors have been the exclusive owners of the trademark, label, and trade name consisting of the phrase "German Toast" since said time; that since the twenty-ninth day of May, 1916, the plaintiff has used the said trade name "German Toast" upon the wrappers inclosing its product, together with a pictorial representation on said wrappers as

shown in the exhibit attached to the complaint; that the plaintiff and its predecessors have been the exclusive owners of said trade name since March 20, 1913, and have used said trade name to designate the origin and ownership of the manufacturer and to designate the bread manufactured by it in its said business, and that prior to the use of said trade name by plaintiff, the same had never been used by any other person, firm, or corporation; that by reason of plaintiff's long experience and great care in its business of manufacturing the said bread, and by reason of the good and useful quality of said article, the same became, and was at the time of the grievance set forth in the complaint, widely known under the said trade name to the community, as a valuable and useful article, and had acquired a high reputation as such, and commanded an exclusive sale at the city of Los Angeles and elsewhere, which sale was the source of great profit to plaintiff; that on or about the third day of June, 1916, notwithstanding the long and quiet use enjoyed by plaintiff of said trade name, the defendant, well knowing plaintiff's right to the same, willfully, wrongfully, and unlawfully, disregarding the rights of the plaintiff herein and with intent to injure and destroy the business of the plaintiff, prepared and offered for sale and sold an article of bread in imitation of plaintiff's bread, and with intent to deceive and defraud the public and the buyers and consumers of plaintiff's bread and to defraud the plaintiff, caused the said bread to be wrapped in paper wrappers similar in size and shape to those used on plaintiff's bread, and caused the same to be labeled with a similar device, a label upon which is inscribed the name "German Toast," etc., as shown by exhibit attached to the complaint. The labels used by the plaintiff and defendant, as appears from the exhibits, are of the same general size and shape and on each appears the words "German Toast," in precisely the same style of printing and of precisely the same size, with the capital letters blocked in the same manner and the words underlined alike. We consider it unnecessary to discuss here in detail the points of similarity in the labels and the particulars in which they differ. It is not necessary that the defendant should have duplicated the label used by the plaintiff before relief may be had. (*Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, [50 Am. St. Rep. 57, 30 L. R. A. 182, 42

Pac. 142].) [2] Under the admissions hereinbefore enumerated and the exhibits in evidence, we think the court should have found that the plaintiff had acquired the right to the use of the term "German Toast" as a trade name for its bread as against the defendant, and that the defendant was guilty of unfair competition in the use of its said label upon its bread. Under such circumstances, an injunction should have been granted restraining the defendant from using the said wrapper on the bread manufactured and sold by it. (*Banzhaf v. Chase*, 150 Cal. 180, [88 Pac. 704]; *Modesto Creamery Co. v. Stanislaus etc. Co.*, 168 Cal. 289, [142 Pac. 845].)

[3] The respondent urges in its brief as a reason why the case should not be reversed that it has already abandoned the use of the wrapper in question. The record contains no such information, but a voluntary abandonment would not afford the plaintiff adequate relief, as the defendant might later decide to resume the use of the label. If the label has been abandoned in good faith and for all time, an injunction can do the defendant no harm, and it is a protection to which we deem the plaintiff entitled.

The judgment is reversed, with directions to the trial court to grant an injunction restraining the use by the defendant of the label involved here.

Brittain, J., and Nourse, J., concurred.

[Civ. No. 2042. Third Appellate District.—October 14, 1919.]

JANNETT ASELS, Respondent, v. DAVID ASELS,
Appellant.

[1] PARTITION—WAIVER OF RIGHT BY CONTRACT—BREACH OF CONTRACT BY JOINT TENANT—REVIVAL OF RIGHT.—While the right to partition conferred by section 752 of the Code of Civil Procedure may be waived by agreement, a joint tenant who enters into such an agreement, in consideration of a covenant and agreement on the part of the other joint tenant to farm the land and to keep an

1. Validity of agreement against right to partition, note, 16 L. R. A. 220.

accurate and intelligible account accessible to the former of all receipts and expenditures, is released from any legal or moral obligation to carry out his promise or covenant upon the failure of the other joint tenant to keep his agreement.

APPEAL from a judgment of the Superior Court of San Joaquin County. George F. Buck, Judge. Affirmed.

The facts are stated in the opinion of the court.

Arthur L. Levinsky and Clarence E. Fleming for Appellant.

C. W. Miller for Respondent.

BURNETT, J.—The action was for partition of 640 acres of land in San Joaquin County, which in 1906 was purchased in the joint names of plaintiff and defendant with money which was partly community and partly the separate money of the plaintiff, but the moneys had been so intermingled that it was held by the trial court to have become community property. The court ordered a partition of the land and from the final decree of partition this appeal has been taken. The only defense to the action grew out of and was based upon an agreement in writing made by the parties on the twentieth day of October, 1916. Said agreement recited that plaintiff and defendant were the owners of the land (describing it) and that there had been a misunderstanding and disagreement between them as to the distribution of the money received from the crops raised on said land, and that they had consulted with their respective counsel and had agreed upon, "and do hereby agree upon the following: 1. That there shall be no division or partition between the parties hereto, of the hereinbefore described land and premises."

Paragraphs 2 and 3 of said agreement related to certain moneys in the possession of the Fabian-Grunauer Company and moneys deposited in the Bank of Tracy in the name of either or both of the parties to the agreement; being moneys received for the sale of grain raised on said land during the farming season of 1915 and 1916, and it provided that these moneys should be divided equally between said parties and that said division should constitute a full and final settlement as to all matters between them after the date of the agreement.

Paragraph 4 is as follows: "It is mutually contracted and agreed by and between the parties hereto that the said David Asels shall farm the hereinbefore described land, as he has done in the past, and he shall keep a book wherein shall be truly set forth all expenditures made by him, which said book shall always be accessible to the said Jannett Asels, and any matters therein set forth which she does not understand, shall be fully explained to her by the said David Asels, and she shall be informed of all costs and expenses of farming, and upon a sale of the crops each year, there shall be deducted from the amount realized from said sales all of the aforesaid expenses, and the balance of the moneys realized, each year, from the sale of crops raised on the aforesaid lands, shall be divided equally among and between the parties hereto, which said division shall be made upon the sale of said crops, each year."

The fifth paragraph recited that the said David Asels was the owner of the livestock and farming implements and machinery used in farming said land and provided that he would make no charge for the use of the same "in and about the farming and harvesting of the crops raised on the aforesaid lands."

The sixth and concluding paragraph of said agreement provides "that the parties hereto being agreed among themselves to the foregoing, and then having consulted their respective attorneys in the presence of all the parties hereto, and of the said attorneys, and knowing the contents of this instrument, each of the parties hereto does freely and voluntarily execute this instrument which has been drawn, and is executed for the purpose of, and it does settle all matters of difference in regard to money matters, heretofore existing between the parties hereto up to this date."

In reference to this agreement the court found "that the said defendant David Asels did not keep and has not kept all of the terms and conditions on his part to be provided and kept as in said agreement provided, in this, that the said David Asels did not keep a book wherein should be truly set forth all expenditures made by him in the farming of said lands, and that no such book was always, or at all accessible to the said Jannett Asels, and no matters required to be set forth in said book which the said Jannett Asels did not understand, were fully, or at all explained to her by

the said David Asels, and she was not, and since the execution of said agreement has not been informed of all the costs or expenses of farming said lands, and the said defendant David Asels did not and has not upon a sale of the crops each year, deducted from the amount realized from said sales, all of the aforesaid expenses and divided equally between himself and plaintiff, the balance of the moneys realized each or either year from the sale of crops raised on the aforesaid lands, either upon the sale of said crops or at all."

Then follows a finding that 350 sacks of barley raised on said premises in 1916 and 75 sacks in the year 1917 were sold by defendant and unaccounted for to plaintiff, and that plaintiff often demanded of defendant an accounting for the same, which he refused to give or render.

This finding of the court that he had failed to keep his covenant and agreement is attacked by the appellant on the ground that it is unsupported by the evidence. As to this, however, appellant is entirely in error. It is true there is a substantial conflict, but there is positive and unequivocal testimony on behalf of plaintiff in favor of the finding, and by that we are, of course, concluded. As to his failure to keep a book of accounts and render it accessible at all times to plaintiff it is sufficient to quote the following testimony of plaintiff: "Q. Has he ever shown you any book of account since the date of this paper? A. No, sir. Q. Did you ask him in 1917? A. Yes, sir. Q. To see the account? A. Yes, sir. Q. What reply did he make? A. He said he hadn't any—had no book—didn't have to keep a book. Q. Don't you know Mr. Asels showed you—he had two books that he showed you on each occasion when you wanted to see them, and that he gave you a written statement and you examined it, and when he settled with you he wanted you to sign it and you refused? A. I never saw any of these books at all. I kept asking him time after time for those books. He said he had none; he didn't have to keep them. Q. Sure of that? A. Yes, sir."

The evidence is equally as clear that the defendant failed to account for a large quantity of grain raised on said premises. It seems unnecessary to quote the testimony as to this, which is set out in the brief of respondent. It is true that plaintiff claimed that he overlooked the two lots of grain worth about one thousand one hundred dollars, but the

court no doubt believed that his concealment of the facts was deliberate and willful, and that it was his purpose to appropriate to himself plaintiff's one-half of the proceeds of said grain. The lower court also concluded that his failure to keep a book of account or to show it to plaintiff or to explain the items of expenses in regard to the farming of the land was also willful and deliberate, and that it was in pursuance of his purpose to appropriate a portion of the proceeds from the ranch to which plaintiff was rightfully entitled. In view of the familiar and well-established rule as to conflicting evidence, it would be altogether improper for an appellate court to hold that any of the findings of the lower court is unsupported.

[1] As to the legal effect and integrity of said agreement of October 20, 1916, little needs to be said. The right to partition was conferred upon either party by section 752 of the Code of Civil Procedure, but that this right may be waived is established by section 3513 of the Civil Code and by the decisions of the courts. The law upon the subject is summed up in Freeman on Cotenancy and Partition (second edition, section 442), as follows: "We have spoken of the right of partition as an absolute right incident to every species of cotenancy, . . . and as yielding to no considerations of hardship or inconvenience. In so speaking, we have had in view the law of cotenancy and partition as it exists independent of express or implied agreements between the respective parties in interest. There are cases from which it may be inferred that the right to partition cannot be waived, and that, to an application for partition, no other defense will be noticed by the courts than that the parties do not hold the property together undivided." The learned author thereupon cites cases apparently so holding, but concludes as follows: "But we think the decided preponderance of authority supports the proposition, that the general principle of law that the right to partition is absolute must be confined 'in its application to ordinary joint tenancies or tenancies in common, where the right to partition is left to result as an ordinary legal incident of such tenancy, and that it was never intended to interfere with contracts between the tenants modifying or limiting this otherwise incidental right, nor to render it incompetent for parties to make such contracts,

either at the time of the creation of the tenancy or afterward.' "

We think it equally plain that the consideration which moved plaintiff to agree that the land should not be divided was the promise on the part of the defendant to keep said books showing his expenditure in farming the land and to render them accessible and intelligible to her and also to account to her for all the grain raised upon said premises that should be sold by defendant. In other words, it cannot be successfully controverted that these covenants were mutual and concurrent and that upon the failure of either party to keep his agreement the other would be released from any legal or moral obligation to carry out his own promise or covenant. Any other construction of said agreement of October 20, 1916, appears unreasonable and opposed to the manifest intention of the parties. We are satisfied that the findings of the court are amply supported and that these findings warrant a judgment in favor of plaintiff.

The judgment is affirmed.

Ellison, J., *pro tem.*, and Hart, J., concurred.

[Civ. No. 3026. First Appellate District, Division Two.—October 14, 1919.]

J. F. MURPHY, Appellant, v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK (a Corporation), et al., Defendants; SAMUEL F. RANDALL, Respondent.

- [1] MORTGAGES—CONSTRUCTION OF DEED—FORECLOSURE.—A deed absolute on its face may be treated as a mortgage and foreclosed as such if that was the intention of the parties thereto.
- [2] ID.—CONSTRUCTION OF SECTION 726, CODE OF CIVIL PROCEDURE—APPLICATION TO GUARANTORS AND SURETIES.—The provision of section 726 of the Code of Civil Procedure that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property"

1. Right to foreclose deed intended as security for debt, as an equitable mortgage, note, 22 L. R. A. (N. S.) 572.

was enacted for the benefit of the principal debtor and to relieve him from liability from a multiplicity of actions, and does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract between the two existing obligations—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations.

[3] **ID.—PROSECUTION OF SUIT AGAINST PRINCIPAL DEBTOR—RIGHT TO BRING SUBSEQUENT ACTION AGAINST THIRD PARTIES ON COLLATERAL.**—The fact that a creditor has commenced and prosecuted to final judgment an action against the principal debtor will not constitute a defense to a subsequent action against third parties to foreclose on collateral given by them as security for the payment of the debt.

[4] **CONTRACTS—LIABILITY OF GUARANTORS AND SURETIES—EXTENSION OF.**—Guarantors and sureties cannot be held beyond the express terms of their contracts. Thus, where the limit of their liability is the purchase price of certain property, which is being sold under a lease contract, this liability cannot be extended to cover rentals accruing under the lease or damages for breach of the contract.

[5] **ID.—DEFAULT OF PURCHASER UNDER LEASE CONTRACT—TERMINATION OF CONTRACT—ELECTION OF REMEDIES.**—Where the seller of property under a lease contract, upon default of the purchaser, takes back the property, he treats the contract of sale as at an end. He is then required to stand upon his contract and sue for the breach, or to treat the contract as ended and sue for the rescission. He cannot pursue both remedies.

[6] **ID.—TERMINATION OF CONTRACT—LOSS OF RIGHT TO SUE FOR PURCHASE PRICE—RELEASE OF COLLATERAL.**—Where the seller elects to treat the contract of sale as at an end, he not only loses his right to sue for the purchase price of the property but, by terminating his contract, he loses his right to foreclose on the collateral given as security for the payment of the purchase price.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Reversed.

The facts are stated in the opinion of the court.

A. D. Laughlin for Appellant.

John Dennison and Franklin F. Johnson for Respondent.

NOURSE, J.—This is an appeal from a judgment in favor of the defendants in an action to subject certain real prop-

erty to the payment of an indebtedness. The facts of the case are that on February 25, 1914, one J. F. Goggins executed what has been called by the parties a "lease note," which instrument acknowledged receipt of eight mules, eight horses, harness, etc., received by Goggins from the plaintiff, which he agreed to return within one year, and also contained an agreement on the part of Goggins to pay \$3,375 for the use of said stock. It also reserved to Goggins the privilege of purchasing said property within the year for the sum of \$3,375, said sum to be paid in monthly payments of \$250 or more per month, beginning April 1, 1914. At the same time the defendants Samuel F. Randall and Amanda M. Randall, his wife, executed to the defendant Hellman Commercial Trust & Savings Bank, a deed to the real property in controversy in this action. Said deed was an unconditional grant and stated the consideration to be \$10. At the same time the plaintiff executed a bill of sale of the horses and mules in favor of Goggins. All of these instruments were deposited with the Hellman Commercial Trust & Savings Bank in escrow, with instructions from the plaintiff that the title to the real property was to be reconveyed to the defendant Randall, and the bill of sale of the personal property was to be delivered to Goggins only upon the payment by Goggins of the full amount called for by the agreement.

Nothing was paid on the so-called lease note, and on February 25, 1915, the same was extended for one year by indorsement on the back thereof. On the same date the defendants, Samuel F. Randall and his wife, sent to said bank a letter agreeing to the extension of the note and consenting that the property deeded to the bank should be held as security "until such time as said lease note is paid, together with all accrued interest thereon." This letter also recited that the deed to the bank conveying the property had been made in accordance with the oral understanding of the parties that it was given as collateral security for the payment of the said note. Mr. Goggins never made any payments upon his obligation. He took the stock to San Diego and rented some of the horses and mules to contractors, and placed the others in pasture, where they were being held for feed bills in July, 1915, when the plaintiff went to San Diego. The extended lease note had not expired at that time, but Goggins, being unable to make any payments upon

the same or to pay the feed bills for which the animals were being held, voluntarily surrendered possession to Murphy of the stock which he had, and Murphy paid the feed bills and secured possession of six of the horses and six of the mules, two horses and two mules having been lost.

Plaintiff then commenced an action against Goggins to recover the rentals specified and for damages for the breach of the contract, and recovered a judgment by default for \$6,521.89, which included the rental value of the stock, the value of the two horses and two mules which were not returned, the amount of the feed bills paid by plaintiff, and the amount of depreciation in the value of the stock returned to him by reason of improper care, feeding, etc. This default judgment was rendered on the sixteenth day of October, 1915, which was before the time for payment of the extended lease note had expired. Later, and after such time had expired, the plaintiff began the present action, in which he sought to compel the sale of the property deeded to the bank by Randall and have the proceeds applied to the satisfaction of the judgment against Goggins.

The trial court held that this action was barred by the provisions of section 726 of the Code of Civil Procedure, which provides that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property. [1] The contention of appellant is that the deed and the trust agreement signed by the Randalls together constitute a deed of trust, and that said deed of trust is not within the provisions of section 726, of the Code of Civil Procedure. This is not the theory upon which the case was tried. In the trial court the plaintiff sought to have the instrument treated as a mortgage and foreclosed as such, and he alleges in his complaint that the bank "accepted said deed solely as collateral security" for the performance of all the covenants and agreements contained in the contract between Murphy and Goggins. Plaintiff also sets out in his complaint the letter from the defendant Randall in which the purpose of the deed to the bank is set forth, and where it is stated to be collateral security for the payment of the lease note. The prayer of the complaint is for foreclosure, that the usual decree may be made for the sale of said premises, and that all persons may be barred and foreclosed of all right, claim,

or equity of redemption in said premises. This relief cannot be asked under the terms of any trust agreement of the parties, but only under the power of the court to foreclose mortgages. In the case of *Felton v. Le Breton*, 92 Cal. 457, [28 Pac. 490], it is said that wherever the grantee treats a trust deed as a mortgage and goes into a court of equity asking for a foreclosure and sale under its decree, his relation to the trust property is the same as that of a mortgagee in the foreclosure of an ordinary mortgage. In the case of *Hall v. Arnott*, 80 Cal. 348, [22 Pac. 200], section 726 of the Code of Civil Procedure was held to apply to the foreclosure of a mortgage which was in form a deed absolute where it was admitted by the pleadings that such deed was given as security for an indebtedness. The decisions are numerous to the effect that a deed absolute on its face may be treated as a mortgage and foreclosed as such if that was the intention of the parties thereto. (*Hall v. Arnott, supra; Prefumo v. Russell*, 148 Cal. 451, [83 Pac. 810].)

But it makes little difference whether the deed is treated as a mortgage or as a deed of trust. Treating it in the light most favorable to respondent, that is, as a mortgage, then the question is put squarely in issue whether, the mortgage having been taken as collateral security for the payment of the purchase price specified in the lease note, the plaintiff has lost his right to foreclose because of the judgment against the primary debtor on the contract.

[2] Section 726 of the Code of Civil Procedure provides in part: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property." This section was enacted for the benefit of the principal debtor and to relieve him from a multiplicity of actions. As stated in the opinion of the supreme court in *Martin v. Becker*, 169 Cal. 301, 304, [Ann. Cas. 1916D, 171, 146 Pac. 665], the section followed the statutory change in the common-law rule regarding the character of a mortgage, wherein it was provided that a mortgage conveyed no title, but gave security of a lien only upon the property, whereas under the common-law the mortgage was a conveyance of the title upon a condition subsequent without right of redemption. The recourse under the common law was a suit in equity for relief against the forfeiture, but the mortgagee might go to law to recover the amount

of the debt secured by the mortgage. Thus, under our statute, the mortgage security must first be exhausted before any deficiency judgment can be had against the primary debtor. But the rule is one which was clearly designed for the benefit of the primary debtor, and is, therefore, one which he can waive. Furthermore, as has been said in the case above cited (169 Cal., page 305, [Ann. Cas. 1916D, 171, 146 Pac. 667]), "the law never contemplated that because a man had taken a mortgage he could not take other independent security for his debt, and, if the contract for such security permitted it, enforce such contract without reference to the mortgage debt." The court then held that a materialman who took a mortgage from a contractor on his property for the materials sold and used in the construction of a building by the contractor on the property of another did not lose his right to claim and foreclose a mechanic's lien on the property upon which the materials were used.

In *Knowles v. Sandercock*, 107 Cal. 629, [40 Pac. 1047], the supreme court held that an action would lie against the stockholders of a corporation for a liability of the corporation though the corporate liability was evidenced by its note secured by mortgage. Therein the court say: "The mortgage only affects the remedy against the mortgagor—the corporation." In *Adams v. Wallace*, 119 Cal. 67, [51 Pac. 14], the action was against an independent guarantor of a debt secured by mortgage. The court held that section 726 had no application to such an action, because it was on an independent contract to pay the debt upon the default of the principal debtor. To the same effect are *Carver v. Steele*, 116 Cal. 116, [58 Am. St. Rep. 156, 47 Pac. 1007]; *Kinsel v. Ballou*, 151 Cal. 754, [91 Pac. 620]. In *Commercial Bank of Santa Ana v. Kershner*, 120 Cal. 495, 498, [52 Pac. 848, 849], the supreme court say: "A debt may be secured by pledge, mechanics' lien, judgment lien, attachment, or otherwise, and yet the security may be reinforced by a mortgage on the same or other property." In *Scherhr v. Berkey*, 166 Cal. 157, [135 Pac. 41], the lessor of realty had taken as collateral security for the payment of the lease a chattel mortgage on personal property. Default having been made in the payment of the rents, an action was instituted against the assignee of the lessees in unlawful detainer and judgment recovered for restitution of the premises and three install-

ments of rent, which the court trebled. Thereafter plaintiffs instituted suit to foreclose the mortgage, and section 726 of the Code of Civil Procedure was pleaded in bar. But the supreme court held that it was perfectly proper to sue the lessee for rent and thereafter to foreclose the mortgage to obtain the amount of the damage, saying: "Clearly, section 726 of the Code of Civil Procedure cannot be applied to such a case as this. The liability of the lessees was one thing; the liability of their assignee a different, and distinct thing." To the same effect is *Ashcroft Estate Co. v. Nelson*, 26 Cal. App. 400, [147 Pac. 101]. The same interpretation has been given in an action of replevin. (*Harper v. Gordon*, 128 Cal. 489, [61 Pac. 84].) There the defense was made that an action in replevin would not lie because, under the provisions of section 726 of the Code of Civil Procedure the debt being secured by a mortgage, an action to foreclose the mortgage lien alone could be maintained. In answer to this the supreme court say (128 Cal., page 491, [61 Pac. 85]): "The action here is clearly not to recover the debt, nor do we think it an action 'for the enforcement of any right secured by mortgage,' in the sense intended by the clause restricting the action, upon a debt secured by mortgage, to foreclosure. The action of replevin determines only the right of possession. . . . The object of foreclosure under section 726 of the Code of Civil Procedure is to enforce the lien by subjecting the property to sale."

In the amended answer of Samuel F. Randall it is alleged that the deed was originally given to the bank, at the request of Goggins, as collateral security for the payment of the purchase price of the lease note of Goggins, and this was found to be the fact by the trial court. It was then alleged that at the time of the extension of the lease note the plaintiff requested defendants Samuel F. and Amanda M. Randall to extend their security for a like period, and that the written agreement was then executed by said defendants at the special request of the plaintiff. If their liability was based upon the first allegation referred to and the finding of the court, then they were sureties. If their liability was based upon the latter allegation referred to, then they were guarantors. If the defendants' liability was that of sureties, then they might demand that the plaintiff first seek recovery against the principal debtor, Goggins. (Civ. Code, sec.

2845.) If, on the other hand, their liability was that of guarantors, the plaintiff might elect either to sue them first or to sue the principal debtor without going into equity to foreclose the mortgage. [3] If he first sued the principal debtor, he was not subsequently barred from bringing suit in foreclosure. (*Adams v. Wallace*, 119 Cal. 67, 70, [51 Pac. 14]; *Withers v. Bonsfield*, 42 Cal. App. 304, [183 Pac. 855]; *Pierce v. Merrill*, 128 Cal. 464, 470, [79 Am. St. Rep. 56, 61 Pac. 64]; *San Francisco Theological Seminary v. Monterey County Gas & Electric Co.*, 179 Cal. 166, [175 Pac. 693].) Thus the rule in this state as to section 726 clearly is that this section applies to the primary debtor and was enacted for his benefit; that it does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract existing between the two obligations—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations. The trial court, therefore, was in error when it gave judgment for defendants upon this special defense.

For the reasons given the judgment must be reversed and the cause remanded for a new trial. It should not be implied from this, however, as fairly it might be, that plaintiff should have judgment on the issues framed by the pleadings. The complaint alleges that suit was instituted against Goggins and prosecuted to judgment in the sum of \$6,521.89, and the amended answer alleges that prior to the institution of said suit Goggins voluntarily surrendered to plaintiff all the personal property covered by the lease note. The judgment-roll in the suit referred to was admitted in evidence without objection, and therefrom it appears that plaintiff sued Goggins for the rentals accruing under the note and for damages arising out of the breach of the contract.

The allegations of the amended answer are that the deed was given as collateral security for the payment of the purchase price of the stock. The written undertaking executed by the defendants recites that the deed is given as collateral security for that certain lease note for \$3,375 and accrued interest. The court found that the deed was executed "as security for the payment of the note," and that at the time of its execution the defendants understood that

it was to be held as security "for the payment of the purchase price of the personal property purchased by F. J. Goggins."

[4] It is elementary that a guarantor cannot be liable beyond the express terms of the contract of guaranty. (*San Francisco Theological Seminary v. Monterey Co. Gas & Electric Co.*, 179 Cal. 166, [175 Pac. 693].) A surety has all the rights of a guarantor (Civ. Code, sec. 2844), and cannot be held beyond the express terms of his contract. (Civ. Code, sec. 2836.) Thus, whether the Randalls were guarantors or sureties, the limit of their liability, as shown by the findings of the trial court, was the purchase price of the property, and this could not be extended to cover rentals accruing under the terms of the lease or damages for the breach of the contract. [5] In taking back the stock the plaintiff treated the contract of sale as at an end. He was then required to make his election as to which remedy he would pursue—to stand upon his contract and sue for the breach, or to treat the contract as ended and sue for the rescission. He could not pursue both remedies. (*House v. Piercy*, 181 Cal. 247, [183 Pac. 807].) [6] Having elected to treat the contract of sale as at an end, he could not thereafter sue for the purchase price of the stock, and, if the liability of the defendants in this case was limited to the payment of the purchase price, it would seem that the plaintiff by terminating his contract has lost his right of action to enforce the security of the mortgage. Though the character of the prior action was properly put in issue, this point was not urged before the trial court, and it is not argued upon this appeal. What is said herein regarding it is said merely by way of suggestion for the assistance of the parties and the trial court upon the retrial of the action, and not as determinative of the rights of the parties upon such new trial.

The judgment is reversed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 3006. First Appellate District, Division One.—October 15, 1919.]

MARY O. THOMPSON, Appellant, v. **JOHN R. THOMAS**
et al., Respondents.

- [1] **MORTGAGES—PARTIAL RELEASE—DEDUCTION OF MARKET VALUE.**—Generally, a mortgagee, with notice of several successive alienations of parts of the mortgaged premises primarily liable for the payment of the debt, cannot release a portion of the mortgaged premises for less than the market value of the property so released and charge the remaining portion of the premises with the payment of the balance of the mortgage debt without deducting therefrom the market value of the part released.
- [2] **ID.—AGREEMENT THAT MORTGAGEE MAY GRANT PARTIAL RELEASE—PUBLIC POLICY.**—Where, however, a mortgage contains a provision that “the mortgagor agrees that the mortgagee may at any time without notice release portions of said mortgaged premises from the lien of this mortgage without affecting the personal liability of any person for the payment of said indebtedness, or the lien of this mortgage upon the remainder of the mortgaged premises, for the full amount of said indebtedness then remaining unpaid,” the mortgagee has a right to grant a release of a portion of the mortgaged premises for less than the market value of the property so released and to hold the remainder of the property for the balance of the mortgage debt, and such a provision is not contrary to public policy.

APPEAL from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. Reversed.

The facts are stated in the opinion of the court.

Hahn & Hahn and Elvon Musick for Appellant.

Frank C. Dunham and Geo. P. Cary for Respondents.

KERRIGAN, J.—This is an appeal from a judgment in an action to foreclose a mortgage. The facts are as follows:

On August 13, 1913, a note, secured by the mortgage in question, was executed by the defendant Thomas to the plaintiff in consideration of a loan of four thousand dollars, the mortgage covering a number of lots of land situate in San Bernardino County. On March 7,

1914, Thomas executed and delivered to Harold P. Collins a grant deed covering a portion of the mortgaged property. This deed was taken subject to the mortgage, and also contained a provision that the grantee agreed to pay the same. On September 12, 1914, Thomas conveyed the remaining lots except three thereof to defendant Callie L. McDowell, the deed reciting that the lots were subject to the mortgage. On September 23, 1914, Harold P. Collins by deed conveyed the property acquired by him above mentioned to R. F. Howard, this deed also being made subject to the mortgage. On July 7, 1915, the mortgagee, with actual notice of the aforesaid conveyances and of their terms, in consideration of the sum of \$350, released the lots conveyed to Collins and by him subsequently transferred to Howard. In its findings the court places a value of two thousand dollars upon these lots. The various instruments referred to were all duly recorded.

The mortgage contained the following provision: "The mortgagor agrees that the mortgagee may at any time without notice release portions of said mortgaged premises from the lien of this mortgage without affecting the personal liability of any person for the payment of said indebtedness, or the lien of this mortgage upon the remainder of the mortgaged premises, for the full amount of said indebtedness then remaining unpaid."

The court in its decree decided that this provision of the mortgage was invalid, and in ordering judgment for the plaintiff directed that she credit upon the amount claimed the sum of two thousand dollars, which the court found to be the value of that part of the mortgaged premises released by her to Howard.

The plaintiff appeals from the judgment.

As we view the record there is only one important point in the case. The appellant contends that under the provision of the mortgage quoted she had a right to grant the partial release of the mortgaged premises to Howard for less than the market value of the property so released and to hold the remainder for the balance. [1] Generally, this could not be done, for the rule appears to be that a mortgagee, with notice of several successive alienations of parts of the mortgaged premises primarily liable for the payment of the debt, cannot be permitted to charge other portions of the premises

with the payment of the mortgage debt without deducting therefrom the market value of the part released. (*Woodward v. Brown*, 119 Cal. 283, [63 Am. St. Rep. 108, 51 Pac. 2, 542]; *Irvine v. Perry*, 119 Cal. 352, [51 Pac. 544, 949]; *Blood v. Munn*, 155 Cal. 228, [100 Pac. 694]; *Humboldt Savings Bank v. McCleverty*, 161 Cal. 285, [119 Pac. 82]; 2 Jones on Mortgages, 7th ed., sec. 722 et seq.; 27 Cyc. 1372.) In other words, under this principle of equity the plaintiff, having knowledge of the several conveyances of portions of the mortgaged premises made subsequent to the giving of the mortgage, and of their terms, could not release the parts thereof conveyed to Howard for less than their reasonable value and enforce the balance of her claim against the remainder of the land. [2] But the provision in the mortgage upon which this controversy turns appears to have been inserted therein for the express purpose of avoiding the application of this equitable doctrine, and we perceive no reason why the provision should not be given the effect intended. Any person dealing with the mortgaged property did so charged with knowledge of the terms of the mortgage, one of which expressly gave to the mortgagee the right to release part of the property covered thereby without affecting her right against anyone personally liable for the payment of the secured indebtedness, or her right to look to the remainder of the mortgaged premises as security for the full payment of the indebtedness remaining unpaid. We cannot regard as meritorious the respondents' suggestion that this provision of the mortgage is contrary to public policy and, therefore, void. The law of this state gives very wide latitude to persons in respect to making contracts affecting their private interests, and we see no reason for holding that considerations of public policy forbid persons from entering into a contract by which they provide, as was done in this case, for the effect of a release of a portion of the mortgaged premises.

If we are correct in this view, it results that the trial court erred in its conclusion of law by which it credited upon the mortgage indebtedness the sum of two thousand dollars on account of the release by plaintiff of the lien of her mortgage upon that part of the premises transferred to R. F. Howard, instead of the sum of \$350; and also in its conclusion of law that the provision of the mortgage herein-

before set forth was not binding upon purchasers or lienholders for value when actual notice of their interest has been brought home to the mortgagee; and also in its conclusions of law numbered IV and V in so far as they are affected by the construction of the said provision of the mortgage adopted by said trial court.

The judgment is, therefore, reversed and the cause remanded to the trial court for further proceedings in accordance with the views herein expressed.

Richards, J., and Waste, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 11, 1920.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2994. First Appellate District, Division One.—October 15, 1919.]

EXCELSIOR CEREAL MILLING COMPANY (a Corporation), Appellant, v. **TAYLOR MILLING COMPANY** (a Corporation), Respondent.

- [1] **TRADE NAME—DUPLICATION OF—INJUNCTION—PLEADING—PROOF.**—Upon proper averments and proof of fraudulent intent and conduct on the part of a defendant in so duplicating the plaintiff's product or imitating the name or content of its wares, or the place or places of sale, as to deceive the public into the notion that it was in fact entering the plaintiff's store or buying the plaintiff's goods, a court of equity will enjoin the further pursuit of such fraudulent purpose and practices.
- [2] **ID.—SIMILARITY OF NAMES—UNFAIR TRADE DEALINGS BY COMPETITOR—ESSENTIALS TO RELIEF.**—Where the plaintiff has no exclu-

1. Similarity of name as constituting infringement of trademark or trade name, note, **Ann. Cas.** 1915B, 327.

2. Use of personal or corporate trade name as unfair competition, notes, 2 **Ann. Cas.** 415; 16 **Ann. Cas.** 596.

sive right by way of trademark in the use of a particular name or term in the description of his business or product, he may not rely upon the mere similarity of names or terms employed by a competitor to establish fraud or justify an injunction, but in order to obtain such relief, the plaintiff in such case must aver and prove such a condition of unfair trade dealing on the part of the competitor in the way of duplication, imitation, advertising, and soliciting as would amount to a showing of willful fraud, imposition, and deceit.

- [3] **ID.—USE OF WORD “FLAPJACK”—ACTION FOR INJUNCTION—INSUFFICIENCY OF COMPLAINT.**—In this action by a milling company whose product was put forth under the name of “California Flapjack Flour” to restrain the use by the defendant of the name “Flapjack” in connection with the product which the latter put forth under the names, “Los Angeles Best Self-rising Flapjack Flour,” and “Taylor’s Improved Flapjack Flour,” the complaint failed to state a cause of action, there being no showing of any attempt on the part of the defendant to deceive the public by a duplication of names, or that the defendant in placing its product upon the market under such distinctive names had done anything in the way of duplicating the wrappings or imitating the packages containing the plaintiff’s wares, or of doing anything whatever in the way of advertising or soliciting which would have a tendency to deceive or mislead the purchasing public into the impression that they were buying the plaintiff’s wares.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Donald Barker, James M. O’Brien and Arthur R. Smiley for Appellant.

Kenton A. Miller for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of the defendant after an order sustaining its demurrer to the plaintiff’s complaint, the latter having declined to amend.

The facts of the case as set forth in said complaint are briefly these: In the year 1907, and long prior thereto, the

3. Fraudulent intent as necessary element of unfair competition or infringement of trademark, note, 3 *Ann. Cas.* 32.

Del Monte Milling Company was engaged in the manufacture and sale of food products throughout California and adjacent states, in the course of which it had discovered a process for the blending of different kinds of flour so as to produce a compound to be used in the making of pancakes, waffles, etc., and which it had introduced to the trade and largely sold under the name of "California Flapjack Flour." In 1907 the Del Monte Milling Company sold to the plaintiff the exclusive right to use this process in the manufacture of said compound for sale in certain of the southern counties of California and in the states of Nevada and Arizona. The plaintiff thereupon began the manufacture and sale of the product under the name of "California Flapjack Flour," and have since continued so to do, and have expended large sums in advertising said product under said name, and have built up an extensive trade therein. It is also alleged that because of the long-continued use of said name the word "Flapjack" therein has come to be understood by consumers and by the public and the trade generally to mean and apply to the particular brand of self-raising flour which the plaintiff was making and selling under said name, and that in fact up to the year 1914 no other like article of food had been put upon the market or sold within said territory under the name of "Flapjack" or "Flapjack Flour." The complaint then proceeds to allege that in the year 1914 the defendant began the manufacture and sale of self-raising flour, to which at first it gave the name of "Pancake Flour," but a year later this name was changed, and the defendant began to put forth its said product under the names of "Flapjack Flour," "Los Angeles Best Self-rising Flapjack Flour" and "Taylor's Improved Flapjack Flour," and to sell the same within said territory under said names, and that many persons have bought the defendant's said products under the belief that they were obtaining the plaintiff's product, and have thereby been deceived to the plaintiff's injury and loss. The complaint prays for an injunction against the defendant restraining it from the use of the name "Flapjack" in connection with the product which the latter puts forth.

The defendant's demurrer was general and the trial court sustained it upon the broad ground that said complaint did

not set forth facts sufficient to constitute a cause of action. The correctness of this ruling is assailed upon this appeal.

We are of the opinion that the trial court was not in error in its said ruling. The appellant concedes that the word "Flapjack" and the phrase "Flapjack Flour" are generic terms, which could not be made the subject of prior or exclusive appropriation as or by means of a trademark, and the plaintiff lays no claim to the possession of any exclusive right thereto or to the use thereof upon that ground. This phase of the case being disposed of by this admission, the only remaining basis upon which the plaintiff could predicate a claim of right to prevent the defendant's use of said terms in marketing its own product would be that by such appropriation and use of said terms the defendant was indulging in a fraudulent practice to the plaintiff's injury which it would be the duty of a court of equity to enjoin.

[1] There can be no question but that upon proper averments and proof of fraudulent intent and conduct on the part of a defendant in so duplicating the plaintiff's product or imitating the name or content of its wares, or the place or places of sale, as to deceive the public into the notion that it was in fact entering the plaintiff's store or buying the plaintiff's goods, a court of equity will enjoin the further pursuit of such fraudulent purpose and practices. The leading case in this state upon that subject is the case of *Weinstock-Lubin Co. v. Marks*, 109 Cal. 529, [50 Am. St. Rep. 57, 30 L. R. A. 182, 42 Pac. 142], in which the supreme court, in a very full and well-reasoned opinion, lays down the law of such a case. [2] On the other hand, it is equally well settled by the case of *Dunston v. Los Angeles Van & Storage Co.*, 165 Cal. 89, [131 Pac. 115], that where the plaintiff has no exclusive right by way of trademark in the use of a particular name or term in the description of his business or product, he may not rely upon the mere similarity of names or terms employed by a competitor to establish fraud or justify an injunction, but that in order to obtain such relief the plaintiff in such a case must aver and prove such a condition of unfair trade dealing on the part of the competitor in the way of duplication, imitation, advertising, and soliciting as would amount to a showing of willful fraud, imposition, and deceit. The case of *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 252, [32

L. R. A. (N. S.) 439, 110 Pac. 913], is also instructive upon this subject, the court therein holding that in the absence of a right in the plaintiff to the use of a particular name or term as a trademark the law will only afford him protection against the unfair competition of one who seeks by imitation of label or package or other artifice to induce persons to deal with him in the belief that they are dealing with the plaintiff or buying his wares. "If," as the court says, "the defendant can be shown to have put up his product with the intent to palm it off as that of the plaintiff, and if it does in fact tend to mislead the purchasing public, a case is made out, even though the plaintiff has shown no exclusive right in any trademark or trade name."

[3] An examination of the plaintiff's complaint herein in the light of these cases will disclose how far short it comes of measuring up as to its facts with the case of *Weinstock-Lubin Co. v. Marks*, *supra*, and also how far it fails to bring the plaintiff's case within the law as laid down in the two later cases above cited. While it is true that the defendant does make use of the old and familiar word "Flapjack," already in use by the plaintiff in relation to its own product, it does not otherwise make any attempt to deceive the public by a duplication of names. The plaintiff's article of merchandise is put forth under the name of "California Flapjack Flour." The defendant's product is marked under the names "Los Angeles Best Self-rising Flapjack Flour" and "Taylor's Improved Flapjack Flour." Not only is there thus displayed the very opposite of an intent to deceive in the matter of names, but in addition to this the plaintiff makes no pretense at any showing that the defendant, in placing its product upon the market under these distinctive names, has done anything in the way of duplicating the wrappings or imitating the packages containing the plaintiff's wares, or of doing anything whatever in the way of advertising or soliciting which would have a tendency to deceive or mislead the purchasing public into the impression that they were buying the plaintiff's wares. Clearly, in the absence of such essential averments it fails to state a cause of action.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 11, 1920.

Angellotti, C. J., Lawlor, J., Wilbur, J., Lennon, J., and Olney, J., concurred.

Melvin, J., was absent.

Shaw, J., dissented from the order denying a hearing in the supreme court and on December 13, 1919, rendered the following opinion thereon:

SHAW, J., Dissenting.—I dissent from the order denying a rehearing and refusing a transfer of this case to the supreme court.

The case comes directly within the principle established by this court in *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, [50 Am. St. Rep. 57, 30 L. R. A. 182, 42 Pac. 142], and *Banzhaf v. Chase*, 150 Cal. 180, [88 Pac. 704]. The principle is that one who, with intent to defraud the plaintiff, uses any artifice, device, or label on his own goods to deceive the plaintiff's customers into the belief that they are buying the plaintiff's goods and thereby induces them to buy the defendant's goods, he is liable in damages for the injury thus caused to the trade of the plaintiff. The complaint in the present case sets forth facts which bring it within this principle. The device used was putting a label, including the word "Flapjack" on the defendant's flour, whereby it led plaintiff's customers to believe they were purchasing flour sold by the plaintiff under that label. The error in the opinion is in assuming that this device could not, as a matter of law, have deceived the plaintiff's customers. The complaint alleges that it did, and the court should not, and could not, properly hold that this allegation is on its face impossible. It might not deceive all persons, but the case is made out if it deceives a sufficient number to constitute a substantial injury to plaintiff's trade and the deceit was practiced with the intent to defraud plaintiff. The allegation is sufficient and the fact could only be determined by the evidence. The case involved nothing more than the sufficiency of the allegations.

[Civ. No. 2990. First Appellate District, Division One.—October 17, 1919.]

W. V. AMBROSE, Respondent, v. **HAMMOND LUMBER COMPANY** (a Corporation), Appellant.

- [1] **FRAUD—DEFENSE—PLEADING.**—Fraud is not available as a defense where such an issue is not tendered by the pleadings.
- [2] **PROMISSORY NOTE—NEGOTIABILITY—INDORSEMENT WITHOUT RECOURSE.**—The indorsement of a promissory note without recourse by the original payee does not destroy its negotiability.
- [3] **ID.—GUARANTEE OF PAYMENT BY INDORSEE.**—The guarantee of the payment of a promissory note by the indorsee does not affect its negotiability.
- [4] **ID.—SALE OF NOTE—GIVING OF LUMBER CREDIT IN PAYMENT—TRANSFER OF CREDIT TO THIRD PARTY—LIABILITY ON CREDIT.**—Where a lumber company, in consideration for a certain promissory note purchased by it in good faith and in due course of business before maturity, gives its indorser a credit on its books for the agreed purchase price of the note, the same to be paid in lumber, and thereafter such credit is transferred to a third person in settlement on an indebtedness to the latter, the lumber company is liable to such third person on the credit.
- [5] **ID.—EXCHANGE OF NOTES—SUFFICIENCY OF CONSIDERATION.**—The delivery by a company to an individual of certain promissory notes executed by it constitutes sufficient consideration for the execution and delivery by such individual to the company of his promissory note for the aggregate amount thereof.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. L. Horton, Gurney E. Newlin and A. W. Ashburn for Appellant.

Scarborough & Bowen for Respondent.

BARDIN, J., pro tem.—This is an appeal from the judgment in favor of the plaintiff. The action was brought to

2. Indorsement of note without recourse as affecting negotiability, notes, 134 Am. St. Rep. 998; L. R. A. 1918F, 1152.

recover damages because of the refusal of the defendant to furnish to plaintiff a quantity of lumber which plaintiff claims he was entitled to receive.

The controversy between plaintiff and defendant is the outgrowth of the execution and delivery of a promissory note of one Henry E. Bothin to Southern California Utilities Company, for five thousand dollars, dated December 3, 1913, payable one year after date. Simultaneously with the delivery of this note there was executed in favor of and delivered to Mr. Bothin, five one thousand dollar notes of said company. Pursuant to the resolution of Southern California Utilities Company the Bothin note was indorsed without recourse and placed in the hands of one Franklin Helm, the promoter of the Southern California Utilities Company, for negotiation. It was the understanding of Mr. Bothin at the time he executed this note that it would be negotiated in order to raise funds to be disbursed in the development of an irrigation project, which, if consummated, would result in his own financial gain. Helm employed one Vigus, a broker, to sell the note, and a sale thereof was made to Hammond Lumber Company, a corporation, the defendant herein, by the terms of which, as found by the court, it was agreed by the defendant to pay to said Helm the sum of four thousand five hundred dollars, which was to be credited upon defendant's books in the name of Franklin Helm, and that the same would be paid by the defendant in lumber at market prices whenever demanded by Helm. Such credit was accordingly entered upon the books of the defendant in favor of said Helm. For his services as broker, Vigus received a like credit for five hundred dollars. Previous to the delivery of the Bothin note to the defendant, and in addition to the indorsement already stated, the following was written upon it:

"I hereby guarantee payment of this note, waiving protest, notice of nonpayment and demand.

"FRANKLIN HELM."

The manager of the defendant testified that but for this guarantee of the payment of the note by Helm the defendant would not have purchased the note.

During the month of December, 1913, Helm applied to plaintiff for a loan of \$3,250, offering as security the said "credit memorandum" for four thousand five hundred dollars, payable in lumber, standing on the books of defendant.

Before making the loan to Helm, the plaintiff, with Helm and the broker, Vigus, went to the office of the defendant and, as Ambrose testified, "asked the bookkeeper if they owed Franklin Helm four thousand five hundred dollars which was to be paid in lumber, and he turned to his ledger sheet and said, 'Yes, he has a credit here of four thousand five hundred dollars on the book.' Mr. Helm says: 'Transfer this to Mr. Ambrose's name,' which was done in the presence of Mr. Helm, Mr. Vigus, and myself. I saw that transfer made to my name on the books of the Hammond Lumber Company in my presence."

Following the transaction at the office of defendant the plaintiff loaned Helm the sum of \$3,250, taking the note of Helm payable in three months. Upon nonpayment of Helm's note at maturity, Ambrose and Helm made a supplemental oral agreement, the effect of which was that the credit standing upon the books of defendant was to be considered the property of plaintiff without condition and Helm's indebtedness to Ambrose to be deemed paid.

Deliveries of lumber aggregating in amount and value \$1,004.95 were made to plaintiff as requested, until August 10, 1914, when defendant refused to deliver any more lumber on the credit referred to, basing its refusal so to do in effect upon the ground that the Bothin note had been issued without consideration.

On December 16, 1914, Mr. Bothin entered into an agreement with the defendant indemnifying it against any loss that might be sustained by it, because of nondelivery of any additional lumber under the aforesaid credit standing on its books, and the defendant, in consideration of such agreement to save it harmless, agreed to furnish no additional lumber upon said credit.

The present action was instituted on June 12, 1915, to recover as damages the balance claimed to be unpaid upon the credit referred to, with interest.

It is the contention of the defendant "that plaintiff was the owner of a non-negotiable instrument subject to all equities and defenses existing against his assignor, Helm; that the Bothin note was valueless, and subject to many infirmities in the hands of the defendant due to the fact that defendant gave only an executory consideration for the same. . . ."

[1] It is also claimed in the briefs of the appellant that the Bothin note is valueless and subject to infirmities in the hands of defendant because of fraud alleged to have been committed by Helm at the inception of the note, and stated to consist of fraudulent representations going to the intended use of the proceeds of the note when negotiated. But the pleadings do not tender such an issue. Fraud not having been pleaded, we do not see how such a defense is available to the defendant (*San Francisco Mercantile Union v. Muller*, 18 Cal. App. 174, [122 Pac. 828]), even though there were no other legal obstacles in the way of the consideration of such defense.

The Bothin note is in form a negotiable note. It was made expressly to be negotiated. [2] It was indorsed without recourse by the original payee, which did not destroy its negotiability (8 Corpus Juris, 370). [3] And neither did the fact that Helm guaranteed its payment affect its negotiability. [4] It seems to have been purchased by defendant in good faith in due course of business, before maturity, and, in view of all the circumstances of the case, for a valuable consideration. We cannot agree with counsel for the appellant that the consideration for the Bothin note continued to be executory after the transfer of the credit in lumber to the plaintiff. Such transfer, under the circumstances already noted, operated as the creation of a new contract which the defendant should not be permitted to disregard. The promise of the defendant to make deliveries of lumber to plaintiff was supported as to consideration, by the detriment suffered by the plaintiff in loaning \$3,250, which would not have otherwise been made, and which loan was never repaid. [5] The delivery of the five promissory notes of the Southern California Utilities Company to Bothin was, of itself, sufficient consideration for the support of the Bothin note (8 Corpus Juris, 227).

At the time of the refusal of the defendant to deliver lumber to the plaintiff, the Bothin note had not matured. How could the defendant then know that it could not realize upon Helm's guarantee of the payment of that note at maturity?

Counsel for the respective parties have been very industrious in the preparation of their respective briefs, and have favored the court with every assistance at hand for the

proper solution of the controversy. After a careful consideration of all the arguments *pro* and *con*, we perceive no reason why the judgment in favor of the plaintiff should not be affirmed. If Mr. Bothin executed his note because of fraudulent representations of Southern California Utilities Company, or of its agent, or if he is entitled to redress of some nature, he must seek it in some proper action. The defendant may not adjudicate those matters for him in this action.

Judgment affirmed.

Richards, J., and Waste, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 16, 1919.

Angellotti, C. J., Shaw, J., Lawlor, J., Lennon, J., and Olney, J., concurred.

Wilbur, J., dissented.

Melvin, J., was absent.

[Civ. No. 2978. First Appellate District, Division One.—October 17, 1919.]

JAMES F. SPENCER et al., Respondents, v. STEPHEN F. DEEMS, Appellant.

[1] RESCISSION—EXCHANGE OF PROPERTIES—FRAUDULENT REPRESENTATIONS—DEFICIT IN RENT—FAILURE TO MAKE TENDER.—Rescission of a contract of exchange of an apartment house business for certain real property, on the ground of fraudulent representations, will not be denied because the plaintiffs failed to tender the amount they were in arrears in the rent of the apartment house, which had accrued since the inception of their tenancy and was unpaid through no fault on their part, but solely by reason of the insufficiency of the income from the apartments to produce the necessary funds for the payment of the monthly rental, where the defendant not only failed to make any objection to the form or the particulars of the tender, but absolutely refused to ac-

quiesce in rescinding the transaction, and he knew at the time of the exchange of the properties the apartment house not only would not realize any profit to the plaintiffs, but, on the contrary, would be in their hands, as it had been in his, a losing venture.

- [2] **ID.—RESCISSION FOR FRAUD—INABILITY TO PLACE DEFENDANT IN STATU QUO—EQUITY.**—While it is true that a court of equity will not, as a general rule, decree a rescission of an executed contract unless the party desirous of effecting such rescission is able to place the defendant in *statu quo*, this rule is not without exception. Where such decree is sought upon the ground of fraud, and, because of peculiar complications or circumstances, it would be manifestly unjust and inequitable or impossible to apply such a rule, the court in the exercise of its broad powers as a court of equity, and not having any special solicitude for the party enmeshed in the web he has spun for others, may decree rescission, notwithstanding such party may not be placed exactly in *statu quo*.
- [3] **ID.—RESCISSION OF CONTRACT—ASSIGNMENT OF LEASE—CONSENT OF OWNER—FINDING.**—A contention that the plaintiffs could not rescind the contract of exchange of properties without the consent of the owner of the apartment house, which consent is not shown in the findings, is without merit, where there is no showing that the lease contained a covenant against assignment and, as found by the trial court, the plaintiffs did tender and offer to the defendant the lease in question, together with an assignment thereof.
- [4] **ID.—FINDINGS OUTSIDE ISSUES—JUDGMENT.**—The action of the trial court in going outside the issues in its findings is immaterial, in so far as the integrity of the resultant judgment is concerned, where the judgment is amply supported by other findings against which such criticism may not be made.
- [5] **ID.—SINGLE MATERIAL MISSTATEMENT—WHEN GROUND FOR RESCISSION.**—A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it has been accompanied by a multitude of other false representations.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

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2. Duty to place other party in *statu quo* on rescission of contract, note, 30 L. R. A. 44.

John E. Daly and James H. Daly for Appellant.

Percy Hight for Respondents.

BARDIN, J., *pro tem.*—The appeal is from the judgment. The record before us for review consists of the judgment-roll alone. Plaintiffs had judgment for the cancellation of a deed and a promissory note, together with other equitable relief, upon the alleged fraud of the defendant.

The facts, as they appear in the pleadings and findings, may be stated to be substantially as follows: In November, 1914, James F. Spencer and his wife, Minnie, were the owners of a residence lot and dwelling thereon situate in the city of Pomona, California, of the value of four thousand three hundred dollars, which property was subject to a mortgage in the sum of three hundred dollars. The defendant, at the same time, was in the possession of and conducting an apartment house at Long Beach, California, held by him as lessee under a lease running for the term of five years from March 22, 1913, at the rental of four hundred dollars per month. The furniture in the apartment house belonged to the defendant but had been mortgaged to defendant's lessor to secure the payment of rent for the full term of defendant's lease.

Under the condition of ownership stated, an exchange of properties of the respective parties was made whereby a deed to the Pomona property passed to the defendant, subject to the outstanding mortgage, and in addition thereto all of the plaintiffs executed and delivered to defendant their promissory note in the sum of eight hundred dollars secured to be paid by a second mortgage on the furniture in the apartment house. The defendant caused his landlord to cancel defendant's lease referred to and to execute a new lease of the apartment house for the unexpired term of the lease held by defendant wherein the plaintiffs Spencer were named as lessees, and which provided for the payment of the same monthly rent that the defendant had been obligated to pay, and which rent was secured to be paid by a first mortgage on the furniture in the apartment house, which furniture had been transferred as a part of the same transaction, to the plaintiffs Spencer.

In the course of a few weeks it was discovered that the plaintiffs Spencer had been induced to part with their property by reason of the fraudulent representations, inducements, and concealments of the defendant and under such circumstances as would warrant the exercise of every power a court of equity possesses to restore to the parties against whom the wrong had been committed the property that had been taken from them, and to place them as near as may be *in statu quo*.

The plaintiffs Spencer made timely and expeditious offer of rescission upon discovery of the fraud that had been perpetrated against them, accompanying such offer with a tender of everything of value they had received from defendant.

Among the representations made by the defendant which the court found to be fraudulent and untrue, and made for the purpose of deceiving the plaintiffs and of inducing them to make the exchange of properties and enter into the obligations referred to, was that the monthly income from the apartment house for more than one year immediately preceding the time of the exchange of properties had each month exceeded the sum of four hundred dollars, and that the defendant had realized a clear profit averaging \$185 per month for the preceding year. The defendant knew before the exchange was consummated that he was taking in exchange for his unprofitable apartment house business all the property the plaintiffs Spencer possessed, and that they would be compelled to meet the accruing rents solely from moneys to be derived from the apartment house business they were embarking upon.

[1] At the time the offer of rescission was made, these plaintiffs were in arrears in rent in the sum of \$507, which had accrued after the inception of their tenancy and unpaid through no fault of any of the plaintiffs, but solely by reason of the insufficiency of the income from the apartments to produce the necessary funds for the payment of the monthly rent.

The defendant makes the point that the judgment of rescission is not supported by the findings, for the reason that there was not tendered to him this \$507 deficit in rent. But such claim is without merit. Not only did the defendant fail to make any objection as to the form or the particulars of the tender, "but absolutely refused to acquiesce in the

rescinding of said transaction." (Civ Code, sec. 1691, subd. 2.) Furthermore, defendant knew at the time of the exchange of properties that the apartment house not only would not realize any profit to the Spencers, but on the contrary, would be in their hands, as it had been in his, a losing venture. Defendant knew, too, that the old people whom he had so grossly imposed upon would be compelled to pay the monthly rent out of the rentals they were to receive. Had the defendant remained in possession, he would have suffered a loss in all probability at least equal to the deficit recited.

[2] While it is true that a court of equity will not, as a general rule, decree a rescission of an executed contract unless the party desirous of effecting such rescission is able to place the defendant *in statu quo*, yet this rule is not without exception. And where such decree is sought upon the ground of fraud, and, because of peculiar complications or circumstances, it would be manifestly unjust and inequitable or impossible to apply such a rule, the court in the exercise of its broad powers of a court of equity, and not having any special solicitude for the party enmeshed in the web he has spun for others, may decree rescission, notwithstanding such party may not be placed exactly *in statu quo*. (9 Corpus Juris, 1210; *Richards v. Farmers' etc. Bank*, 7 Cal. App. 387, [94 Pac. 393].) In the case of *Green v. Duvergey*, 146 Cal. 379, 389, [80 Pac. 234, 238], the court said: "It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed *in statu quo*. If equity can still be done between the parties, courts will grant relief to the defrauded party."

[3] There is no merit in the contention that the respondents could not rescind the contract of exchange of properties without the consent of the owner of the apartment house, which consent is not shown in the findings. There is no showing that the lease contained a covenant against assignment. The finding of the court upon this subject is: "and the plaintiff did then and there tender and offer to the defendant, the said lease, together with an assignment thereof, executed by the plaintiffs, James F. Spencer and Minnie Spencer." The assignment of the lease would operate to

restore the defendant to the same position, with regard to the use of the premises, he had previously occupied.

[4] Assuming that it is true as claimed by appellant that the court went outside the issues in its findings relative to the execution of the lease referred to from the owner of the apartment house, yet such is of no grave moment as far as the integrity of the resultant judgment is concerned, for we find the judgment to be amply supported by other findings against which such criticism may not be made.

As stated in *Davis v. Butler*, 154 Cal. 623-626, [98 Pac. 1047, 1048]: [5] "A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations."

The judgment is affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2904. First Appellate District, Division Two.—October 17, 1919.]

LUIGI FIGONE et al., Appellants, v. GRISOSTOMO GUISTI, Respondent.

[1] NEGLIGENCE—VIOLATION OF STATUTE—WHEN ACTIONABLE NEGLIGENCE.—The violation of a statute or municipal ordinance is actionable negligence only as to a person for whose benefit or protection it was enacted, and where the plaintiff does not belong to the class that the law was designed to protect, the violation thereof will not avail to supply the element of duty owing.

[2] ID.—VIOLATION OF SECTION 273F, PENAL CODE—EMPLOYMENT OF MINOR SON IN SALOON—KILLING OF PATRON—LIABILITY OF FATHER. A father who violates the provisions of section 273f of the Penal Code by sending his son under the age of eighteen years into a saloon conducted by him to assist in the work there, violates a duty owing to his son, but not to third parties, and, therefore, such violation will not furnish a basis for a recovery in an action against such father by the parents of another boy who is killed by the minor son while thus employed.

- [3] **ID.—RESPONSIBILITY OF MASTER FOR TORTS OF SERVANT—ACCESS TO DANGEROUS INSTRUMENTALITY.**—A master is responsible for the torts of his servant only when they are committed within the scope of the employment, and not when they arise out of a private quarrel having nothing to do with the master's business. The fact that the injury involved the use of a dangerous instrumentality, and that it was by reason of his employment that the servant was enabled to get possession thereof, does not alter the rule.
- [4] **ID.—TORT OF MINOR SON—LIABILITY OF FATHER.**—A father is not liable for the tort of his minor son because he negligently placed him within reach of a loaded revolver which the son used to the injury of another.
- [5] **ID.—NONSUIT—WHEN JUSTIFIED.**—A court is justified in granting defendant's motion for a nonsuit after the evidence on both sides has been heard in a case, where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by the evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto for Appellants.

Harry I. Stafford and W. F. Stafford for Respondent.

LANGDON, P. J.—This is an appeal by the plaintiffs from a judgment against them, entered upon the granting of defendant's motion for a nonsuit. The action was one brought by the parents of John Figone, a minor, to recover damages for the death of said John Figone, who was shot by the minor son of the defendant, while said minor son (George Guisti) was in the employ of the defendant. On March 14, 1917, the defendant owned and conducted a saloon and restaurant business at 218 Washington Street, San Francisco. He employed a regular barkeeper, and his son George assisted him in the restaurant and also at the bar when the

3. Parent's liability for tort of minor son where relation of master and servant exists, note, 10 *L. R. A. (N. S.)* 938.

4. Liability of parent for torts of minor child, notes, 11 *Ann. Cas.* 367; *Ann. Cas.* 1912A, 585.

rush of business made his help necessary. Defendant had a loaded revolver in the drawer under the bar counter, which was placed there as a protection against robbers. On March 14, 1917, John Figone entered the saloon. No one was present at this time except the two boys. What happened thereafter appears only from the testimony of George Guisti, who testified that the deceased threatened to "shanghai" him, and he, without being aware of the meaning of this language—and with a general impression that it meant something offensive—pulled out the revolver from the drawer and shot deceased.

It is clear that the action of the boy which caused the death of plaintiff's son was not within the course of the employment, but arose out of the personal quarrel of George Guisti with deceased. However, it is contended that the defendant, in employing in his saloon a boy who was a minor, violated the provisions of section 273f of the Penal Code; that under the decisions of our supreme court such violation of a penal statute constitutes negligence *per se*, and that the only other question remaining to be determined is whether or not such violation was the proximate cause of the injury sustained by the plaintiffs. Section 273f of the Penal Code provides: "Any person whether as parent, guardian, employer, or otherwise . . . who . . . shall send, direct, or cause to be sent or directed to any saloon, gambling-house, house of prostitution, or other immoral place, any minor under the age of eighteen, is guilty of a misdemeanor." Plainly, the defendant was violating the foregoing section when he sent his minor son into the saloon conducted by him to assist in any work there. It has been held by the supreme court of this state that where a defendant violates the express provisions of a statute, that violation itself, when proven, establishes his negligence *per se*. (*Williams v. Southern Pac. Co.*, 173 Cal. 525, 540, [160 Pac. 660]; *Siemers v. Eisen*, 54 Cal. 418; *McKune v. Santa Clara V. M. & L. Co.*, 110 Cal. 480, 485, [42 Pac. 980]; *Stein v. United Railroads*, 159 Cal. 368, 372, [113 Pac. 663]; *Driscoll v. Cable Ry. Co.*, 97 Cal. 553, 565, [33 Am. St. Rep. 203, 32 Pac. 591]; *Bressee v. Los Angeles Traction Co.*, 149 Cal. 131, 139, [5 L. R. A. (N. S.) 1059, 85 Pac. 152]; *Fenn v. Clark*, 11 Cal. App. 79, 81, [103 Pac. 944].) In all of the foregoing cases, however, and in all others which we have

been able to find, the violation of a statute has been held to establish negligence *per se* only in favor of one sought to be benefited by the violated statute. In other words, under the statute, a duty is owing to the persons coming within its protection, and as to such persons a violation thereof is negligence *per se*. The statute being considered here is plainly for the protection and benefit of the minor employee. It is a statute similar to those prohibiting the employment of children in certain dangerous occupations or for more than a stated number of hours each day. Such laws are enacted in the exercise of the police power for the protection and well-being of minors. (*Williams v. Southern Pac. Co.*, 173 Cal. 538, [160 Pac. 660].) "It is a well-established principle that the violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the legislature to be protected by such statute." (*Lepard v. Michigan Cent. R. Co.*, 166 Mich. 373, [40 L. R. A. (N. S.) 1105, 130 N. W. 668].) In the case of *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 164, [60 S. E. 1068, 1070], the court said: "In determining whether the violation of a statute is negligence so as to support an alleged cause of action, the court is called upon to examine the law in respect to its objects; for if it appears that, notwithstanding the violation, none of the consequences contemplated and sought to be guarded against have ensued; or that the plaintiff is not the person or does not belong to the class to whose benefit or for whose protection the statute was enacted, the court cannot declare that there is a case of negligence *per se* as to that cause of action or that plaintiff."

[1] It may be said that there is practically no dissent from the proposition that the violation of a statute or municipal ordinance is actionable negligence only as to a person for whose benefit or protection it was enacted, and that where the plaintiff does not belong to the class that the law was designed to protect, it follows that it will not avail to supply the element of duty owing. (*Indiana etc. Coal Co. v. Neal*, 166 Ind. 458, [9 Ann. Cas. 424, and note, 77 N. E. 850].) "In an action based upon a neglect of duty, it is not enough for the plaintiff to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed; he must show that the duty was im-

posed for his benefit and was one which the defendant owed to him for his protection." (*Kelly v. Henry Muhs Co.*, 71 N. J. L. 358, [59 Atl. 23], see, also, note to *Gilson v. Delaware Canal Co.*, 36 Am. St. Rep. 802, at p. 817; *Louisville & N. R. Co. v. Holland*, 164 Ala. 73, [137 Am. St. Rep. 25, 51 South. 365, 366]; *Southern Coal etc. Co. v. Hopp*, 133 Ill. App. 239; *Menut v. Boston etc. R. Co.*, 207 Mass. 12, [20 Ann. Cas. 1213, 30 L. R. A. (N. S.) 1196, 92 N. E. 1032]; *Racine v. Morris*, 201 N. Y. 240, [94 N. E. 864, 866]; *Everett v. Great Northern R. Co.*, 100 Minn. 309, [10 Ann. Cas. 294, 297, [9 L. R. A. (N. S.) 703, 111 N. W. 281].)

[2] It appears, therefore, that the violation of the statute was a violation of a duty owing to the boy employed, but was not a violation of any duty owing to the plaintiffs, and, therefore, does not furnish a basis for a recovery in this action. Hence, plaintiffs' rights must be examined in the light of very well-settled legal principles. There are two theories which are urged by appellants—one involves a liability by reason of the relationship of principal and agent; and the other a liability by reason of the relationship of father and son. [3] The rule is entirely beyond question that a master is responsible for the torts of his servant only when they are committed within the scope of the employment. The fact, emphasized by the appellants, that the injury to plaintiffs involved the use of a revolver which is a dangerous instrumentality, and that it was by reason of his employment that George Guisti was enabled to get possession of this weapon, does not alter the rule, in this state, at least. For it has been held in the case of *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, [27 Am. St. Rep. 223, 15 L. R. A. 475, 29 Pac. 234], that where a servant of the railroad company perverts the appliances of the company to wanton and malicious purposes to the injury of others, the company is not liable. In that case the servant was in charge of a steam engine (which has also been held to be a dangerous instrumentality) and he willfully and wantonly backed it toward a street-car which was crossing the railroad tracks, with the intent to frighten the passengers in the street-car without colliding therewith, and, as a result, some of the passengers became frightened and jumped from the street-car and were injured. The evidence is clear in the present case, as we have stated before,

that the shooting was entirely outside of the employment. It arose out of a private quarrel, and had nothing to do with keeping order in the saloon or furthering the master's business. Upon the theory of responsibility growing out of the relation of master and servant, we think the nonsuit was proper.

[4] The second theory of appellants is that the father is liable for the tort of his son because he negligently placed him within reach of a loaded revolver which the son used to the injury of the plaintiffs. It is true there are several authorities in other states which might indicate that, in such states, such liability exists and that the question of negligence is one for the jury. We are able to find but one authority in this state upon the question involved here, but as that case stands unmodified and uncontradicted, we are bound by such authority and must decide this case in harmony therewith. That case is the case of *Hagerty v. Powers*, 66 Cal. 368, [56 Am. Rep. 101, 5 Pac. 622], in which the complaint alleged that the father negligently, carelessly, and willfully countenanced his child in having a loaded pistol, which pistol the boy so carelessly used as to shoot the infant child of the plaintiff. A demurrer was interposed and sustained. The supreme court upheld the action of the trial court, stating in the opinion that the rule therein announced was in accordance with the common law. In view of this case, the second theory of the appellants is also without merit.

In considering the admission made by the pleadings upon which appellants rely, we meet the first objection of appellants that the trial court erred in allowing an amendment to the answer after the nonsuit order had been made. We may concede this point to the appellants, and we shall discuss the pleadings as they were at the time of the granting of the nonsuit and before the amendment to the answer. They then contained an admission that on an occasion previous to the shooting, out of which this action arose, the boy, George Guisti, had drawn a revolver on a person having occasion to enter the saloon and that such fact was known to the father—the defendant. We call attention to the fact that the allegation of the amended complaint is that George Guisti drew the revolver in November *without cause or provocation* upon a person having occasion to enter the saloon. The answer, while admitting the drawing of the revolver at that time,

denies that it was drawn without cause or provocation, and alleges that it was drawn with just cause and provocation, and denies that the father was aware that the boy would draw the revolver or discharge the same willfully, carelessly, and unnecessarily during his employment. These controverted allegations of the amended complaint are unsustained by the evidence. The only evidence offered upon the question of whether or not the defendant had reason to believe the boy would "draw the revolver or discharge the same willfully, carelessly, and unnecessarily during his employment," was the testimony of Robert Gotelli, as follows: "Q. Did you see any pistol in George Guisti's hand some time before that [the time of the killing]? A. Yes. Q. How long before? A. I could not tell you. About four or five months. Q. Where did you see the pistol in his hands, in the saloon? A. He was right there. He was only fooling around with another fellow. Q. Did you see the pistol in his hands? Where did he get that pistol? A. I could not tell you. I was eating lunch. I just spotted it, that is all, and I went out. I did not stay there very much. . . . Q. Did you see where George Guisti got the pistol from? A. I saw him when he was fooling around there but I could not tell you where he got it from. Q. Where did he have the pistol? A. He had it in his hand. Q. I wish you would state how he held the pistol. A. He held it in his hand and *showed it to the other fellow*. I just spotted it there and I went out. I know they are always fooling around there. *I don't know where he put it or whether he pointed it at the other fellow*. Q. What did the son say when he had the pistol in his hand? A. He said, 'Look out,' that is all I heard and I went out. Q. Is that all he said, 'Look out'? A. Yes. Q. Where was Mr. Guisti at that time? Was he in the restaurant or in the saloon? A. He was right there serving the people, he was over there by the free lunch counter, because I never saw him alone in there."

There is nothing in this evidence to show that young Guisti showed any inclination to injure anyone. We do not think the incident was such that a reasonable mind could say that because of it the employer had reason to believe the boy a dangerous person to have around the saloon or that the employer was negligent thereafter, because of such incident, in retaining the boy in his employ. The details of the incident

are indefinite and incomplete, but so far as the testimony goes, there is no evidence of any malice or of any danger to anyone. The witness stated that young Guisti showed the pistol "to the other fellow"; that he warned him at the same time to "Look out," and the witness does not know whether or not the pistol was pointed at anyone. [5] We are of the opinion that if the court had allowed the case to go to the jury upon the admission and evidence herein discussed, and the jury had returned a verdict for the plaintiffs, the court would have been compelled to have set the verdict aside as unsustained by the evidence. The rule is expressed in the case of *Geary v. Simmons*, 39 Cal. 224, that a court is justified in granting defendant's motion for nonsuit after the evidence on both sides has been heard in a case, where, if the motion had been denied and a verdict found for plaintiff it would have been set aside as not supported by the evidence.

We are, therefore, of the opinion that upon every theory of the case, the action of the trial court was proper.

The judgment is affirmed.

Nourse, J., concurred.

BRITTAIN, J., Dissenting.—It is with regret that for the first time since the organization of this division of the court I am compelled to dissent from the opinion and conclusions of my associates in regard to the controlling facts of the case and the applicability to them of the rules of law which would be unquestionable in a case to which they might properly apply.

The appeal is from a judgment of nonsuit in an action for damages for death by wrongful act. The plaintiffs and appellants are the parents of John Figone, twenty years and five months old, who was killed by an employee of the defendant in the defendant's saloon, of which the employee was in sole charge. The shooting was done with a revolver which the defendant kept within ready reach back of his bar, as the defendant stated, so that if anyone tried to hold him up he would be ready for him. At the time of the shooting the defendant's employee, who was his own son, was seventeen years old, and had been in the defendant's employ some fifteen or sixteen months. It was a place where patrons dropped in to get a drink, and on being served with the drink, if they de-

sired, they were served with a free lunch, the same as in any other saloon. There was a separate dining-room. The boy who did the shooting was sometimes engaged in serving meals in the dining-room, sometimes in serving free lunch and making change in the saloon, and sometimes in serving drinks over the bar in the saloon. Section 273f of the Penal Code provides that "Any person, whether as parent, . . . employer or otherwise, . . . who as employer or otherwise, shall send, direct, or cause to be sent or directed to any saloon, . . . or other immoral place, any minor under the age of eighteen, is guilty of a misdemeanor." Figone was killed on March 14, 1917. In November, 1916, the boy who shot Figone drew the same revolver upon another person who entered the saloon for the purpose of patronizing it. A witness to that occurrence testified that at the time the boys were fooling, and that the defendant was present. In his answer the defendant admitted the revolver was drawn upon a patron of the saloon at that time, and asserted that it was for just cause and because of provocation. No facts were stated in the answer to support those legal conclusions. They amounted merely to an admission on the part of the employer that he knew his minor employee had drawn the deadly weapon, which he provided and kept in his place of business, upon a patron of his saloon, and that he, the employer, approved the act. The answer containing the admissions was regularly admitted in evidence without objection on the part of the defendant. In the saloon, at the end of the bar, was a small space, separated from the bar by curtains, to which patrons of the saloon retired for private conversation. This space was called "the office" in a statement made by the shooter to the police after his arrest. The only evidence of what occurred at the time of the killing was in this self-serving statement of young Guisti. He said: "I was washing glasses and I did not notice John Figone come into the office. And I was all finished washing glasses, I noticed him in the office. I said: 'Hello, John.' I said: 'How are you?' and he said some Sunday he was going to take me to San Jose and shanghai me. I did not know what the word means. I thought it had a vulgar meaning. I said: 'Oh, no, you are not.' He said: 'Oh, yes.' It was then I jumped behind the counter and took the revolver and held it pointed at him, and I said: 'You going to stop now?' And all of a sudden I seen

him laying on the floor hollering for help. I am not sure I pulled the trigger, but I heard the gun explode. At the time I pointed the revolver he was halfway up in his chair, and then I seen him on the floor crying for help." He further stated what he thought was meant by "shanghai," but it is impossible that he could have believed that Figone at that time and in that public place either could or would attempt the act which Guisti described.

The foregoing facts were before the court when the motion for nonsuit was made. They are stated most strongly for the plaintiffs. "Upon a motion for nonsuit, the evidence, and every inference that may be fairly drawn from it, must be viewed in the light most favorable to the plaintiff's claim. (*Rauer v. Hertweck*, 175 Cal. 280, [165 Pac. 948]; *Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, [56 Pac. 776]; *Hanley v. California etc. Co.*, 127 Cal. 232, [47 L. R. A. 597, 59 Pac. 577].)

It has been held in this state that a father as such is not liable for the shooting of another child by his minor son, even though it was alleged that the father "willfully, carelessly, and negligently suffered, permitted, countenanced, and allowed his son to have possession of a loaded pistol." (*Hagerty v. Powers*, 66 Cal. 368, [56 Am. Rep. 101, 5 Pac. 622].) In the present case, therefore, there is no question concerning the liability of the defendant merely as the father of the boy who did the shooting. The defendant's liability, if he was negligent, resulted from his relationship with the boy as employer.

In support of the judgment it is strenuously contended that the shooting of Figone was not in the course of the employment of Guisti. The familiar rule that an employer is not liable for the tortious act of his employee done outside of the course of employment is invoked, and the long line of cases announcing this salutary rule is cited. The rule has well-defined limitations. The law charges every man with responsibilities he may not evade on the ground that he is an employer. If, for instance, he does not act with the care which an ordinarily prudent man exercises in the selection of his employees, and injury results thereby, the master may not evade responsibility under the "course of employment" rule. The defendant left in sole charge of his saloon his seventeen year old employee, and as a part of the equipment

of the saloon and within easy reach was a revolver, which the master repeatedly stated he kept so that if anyone attempted to hold him up he would be ready for him. "Every person who acts through a representative is under obligation to discover the skill, experience and diligence of his agent, and if he selects one who is incompetent to perform the duties of the service, he will be accountable to any person who may have sustained damage by such incompetency. Indeed proof of known incompetence has been held by excellent authority to be a foundation for the allowance of punitive damages." This statement of the law is supported by numerous authorities. (18 R. C. L. 791.)

It is argued for the appellants that the employment of the boy in violation of section 273f of the Penal Code constituted negligence *per se*. Generally, the violation of a penal statute which shows on its face that it was enacted for the protection of a particular class may not be invoked as showing negligence as a matter of law, except by one within the protected class. This rule also is limited. In a case frequently cited as a leading one upon the rule, it was expressly recognized that a co-employee of a child improperly employed was within the protection of the child labor law. In that case it was further fully shown that there was no causal connection between the violation of the statute and the injury of which complaint was made. It does not support the contention that the violation of such a penal statute closely connected with an injury to a third person cannot be relied upon in an action for negligence against the master under the rule requiring him to exercise prudence in the selection of competent employees. (*Platt v. Southern Photo etc. Co.*, 4 Ga. App. 159, [60 S. E. 1068].) Section 273f of the Penal Code might properly be considered as one passed for the benefit of the entire community, and so considered its violation would amount to negligence *per se*. It is not necessary so to determine in this case. If it be considered as one primarily passed for the protection of young Guisti, its evident purpose was to protect him and other minors from the evil effects of being sent to a saloon or other immoral place. As a fact only it was an expression, on the part of the people of the state as ordinarily prudent men of their views concerning the competency of minors employed in a saloon. For fifteen or sixteen months the employer had daily imparted to his youthful em-

ployee the lesson that the law defining crimes was not worthy of consideration. Not alone did the morals of young Guisti suffer because he was daily sent to the saloon by his employer, but they were further sapped by the repeated lessons of the employer that the prohibitions of the criminal law were without force.

Again, the "course of employment" rule does not apply where, even though the employer may have exercised ordinary prudence in the selection of his servants, knowledge is brought home to him of habits of wrongdoing, or infirmities of temper or lack of discretion, in the performance of the duties placed upon them by the employer. One illustration of this rule is that "if a railroad company, for instance, knowingly and wantonly employs a drunken engineer, or switchman, or retains one after knowledge of his habits is clearly brought home to the company . . . and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages." (*Cleghorn v. New York Cent. etc. R. Co.*, 56 N. Y. 44, [15 Am. Rep. 375].) Recognizing the justice of this principle, it has sometimes been held that in permitting employees to indulge in vicious habits of work, the master is guilty of maintaining a nuisance. (*Hogle v. Franklin etc. Co.*, 199 N. Y. 388, [32 L. R. A. (N. S.) 1038, 92 N. E. 794]; *Fletcher v. Baltimore etc. Co.*, 168 U. S. 135, [42 L. Ed. 411, 18 Sup. Ct. Rep. 35, see, also, Rose's U. S. Notes]; *Swinnarton v. Le Boutilier*, 149 N. Y. 752, [43 N. E. 990].) The reasoning on which these cases depend would apply equally to a case where a motorman, for instance, was retained after the master knew that on one occasion he had fallen in a fit while operating an electric car, or where a master retained a boy in charge of a loaded revolver, knowing he had on one occasion committed an unwarranted assault with it. While the fact of negligence in the final act may not be shown by proof of a similar act of negligence on another occasion, evidence of such an act is proper to show the employer's knowledge of the employee's unfitness for service. (18 R. C. L. 791.) In the present case the master knew of the wrongful use of the revolver by his minor employee before the shooting in question. He retained him as his employee, and on the day of the shooting left him in charge of the same instrumentality. While it is argued that the shooting of Figone was not in the course

of his employment, the master approved the first wrongful use of the instrumentality by his employee. The question of fact was, therefore, presented as to whether or not a reasonably prudent man would have left the seventeen year old boy in sole charge of the saloon, of which the revolver was a part of the equipment.

It is argued that every man may own firearms and there is nothing unlawful in leaving them loaded. This is true, but "firearms are extraordinarily dangerous. A person who handles such a weapon is bound to use extraordinary care to prevent injury to others and is held to strict accountability for want of such care." (*Rudd v. Byrnes*, 156 Cal. 640, [20 Ann. Cas. 124, 26 L. R. A. (N. S.) 134, 105 Pac. 959].) Might reasonable men differ in regard to the extraordinary care, or the lack of it, exercised by the master in leaving this loaded revolver within such handy reach of his minor employee, particularly when he knew of its former misuse?

The "scope of employment" rule is also limited by the impossibility of the master to avoid the consequences of an employee's use of dangerous agencies placed in his control by the master. In those cases, "responsibility is made to depend upon the fact that the wrong was made possible by the position of the employee and the instrumentalities furnished by the employer." (18 R. C. L. 787, 788.) "All courts agree that when the employer places in the hands and under the control of his employee an instrumentality of exceptionally dangerous character, he is bound to take exceptional precautions to prevent injury being done thereby. . . . According to the expressions of some opinions if the owner of an exceptionally dangerous agency places it in the hands of an employee, the negligence of the latter, either in failing properly to guard it, or in improperly using it, is the negligence of the owner, for which he is responsible. The employer is said to be answerable for the exercise of the employee's judgment in the use of the instrumentality." (18 R. C. L. 789.) It is argued that this rule does not exist in this state by reason of the decision in a case where a locomotive engineer negligently backed his locomotive toward a street-car on which the plaintiff was a passenger, and from which she jumped, believing herself to be in imminent danger of injury from an anticipated collision between the locomotive and the car. (*Stephenson v. Southern Pacific Co.*, 93 Cal. 558,

[27 Am. St. Rep. 223, 15 L. R. A. 475, 29 Pac. 234].) All that was decided in that case was that under all the facts there under consideration the rule of nonliability of the master for the tortious act of its servant outside of the line of duty would be applied. Even though the opinion in that case might be construed as a definitive holding that under no circumstances would the wanton misuse of the locomotive by the engineer render the employer liable, that decision never has been, and ought not to be, construed as holding that in no case may the employer be held liable for the misuse of a deadly agency with which he has intrusted his employee. The text above quoted from Ruling Case Law is based upon the citation of authorities from Arkansas, Georgia, Illinois, Indiana, Iowa, Mississippi, New York, Ohio, Pennsylvania, Tennessee, Washington, and Wisconsin.

This court ought not decide as a matter of law that in the particular case the defendant was guilty of negligence. Neither upon the facts before the trial court could it decide that the master was not guilty of negligence. Giving the Stephenson case full weight as applying to all the facts in evidence there, and considering the rule which the writer of the article in Ruling Case Law said all courts recognized, the sole question presented on the motion for nonsuit was whether, upon consideration of all the facts in this case, the employment of the minor in violation of the penal statute, the placing him in charge of the extraordinarily dangerous instrument, the approval of his former misuse of it by the master, the retention of him in the same capacity and alone in charge of the weapon, might reasonable men honestly reach different conclusions as to whether or not the defendant had exercised that degree of care which ordinarily prudent men would have exercised. If different conclusions upon these facts might be reached by reasonable men, then under the elementary rules stated at the outset of this opinion, nonsuit should have been denied. The plaintiffs had the constitutional right in such a case and upon such facts to have the question of negligence as a matter of fact determined by a jury. "It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true." (*Burr v. United*

R. R. Co., 163 Cal. 665, [126 Pac. 873].) "Equally well settled is the rule that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be drawn from the evidence." (*Burr v. United R. R. Co.*, *supra*; *Wahlgren v. Market St. R. Co.*, 132 Cal. 656, [62 Pac. 308, 64 Pac. 993]; *Kimic v. San Jose etc. Co.*, 156 Cal. 379, [104 Pac. 986].) "It is only when the evidence is such that but one conclusion in respect to negligence could be reached by a reasonable and impartial man that the question becomes one of law for the court." (*Burr v. United R. R. Co.*, 163 Cal. 665, 666, [126 Pac. 873, 874].) "Negligence is not absolute or intrinsic, but is always relative to some circumstance of time, place, or person and is to be determined by reference to the situation and knowledge of the parties, and all the attendant circumstances, and what would be extreme care under one condition of knowledge and one set of circumstances would be gross negligence with different knowledge and in changed circumstances." (*Smith v. Whittier*, 95 Cal. 279, [30 Pac. 529].) In this case, under all the circumstances the granting of the motion for nonsuit ought not be upheld.

It is argued that even though the employer were negligent, unless his negligence was the proximate cause of the injury, the nonsuit should have been granted. The question of proximate cause in such a case is also one of fact which should have been submitted to the jury. An injury that is the natural and probable consequence of an act of negligence is actionable, and such act is the proximate cause of the injury. It need not be the sole cause. If the acts constitute a continuous succession of events, so connected that they become a natural whole, liability will attach. There may be a succession of intermediate acts, each produced by the one preceding and producing the one following. (*Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469, [24 L. Ed. 256]; *Mack v. South Bound R. R. Co.*, 52 S. C. 323, [68 Am. St. Rep. 913, 40 L. R. A. 679, 29 S. E. 905]; *Atkinson v. Goodrich etc. Co.*, 60 Wis. 141, [50 Am. Rep. 352, 18 N. W. 764]; *Purcell v. St. Paul R. Co.*, 48 Minn. 134, [16 L. R. A. 203, 50 N. W. 1034]; *Bosqui v. Sutro R. Co.*, 131 Cal. 397, [63 Pac. 632].) Courts have invariably declared their inability exactly to define the meaning of the words "proximate cause." The supreme

court of the United States has said that each case must be tested "largely on special facts belonging to it, and often on the very nicest discriminations." (*Mutual Ins. Co. v. Tweed*, 7 Wall. 52, [19 L. Ed. 65, see, also, Rose's U. S. Notes].) In regard to lack of that extraordinary care which the supreme court of this state has held to be necessary in the use of firearms, in a comparatively recent English case it was held the defendant was guilty of actionable negligence where the defendant left a gun loaded, at full cock, standing inside of a fence on his lands beside a gap from which a private path led over the defendant's lands from the public road to his house, and the defendant's son, aged between fifteen and sixteen, coming from the road, through the gap on his way home, found the gun, whereupon he returned with it to the public road, and not knowing it was loaded, pointed it, in play, at the plaintiff, who was on the road, and who was injured by its discharge. (*Sullivan v. Creed*, 2 English Ruling Cases, 131.) In another case, the defendant, being possessed of a loaded gun, sent his servant, a young girl, for it, with instructions to take the priming out, which was accordingly done, and damage occurred to the plaintiff's son in consequence of the careless presenting of the gun at him and drawing the trigger, when the gun went off. The court held the defendant was liable in an action on the case. (*Dixon v. Bell*, 19 English Ruling Cases, 26.) The rule in regard to proximate cause is that if but for the negligence of the defendant, in a continuous chain of circumstances, whether coupled with acts of third persons or not, the injury would not have occurred, the defendant's negligence is a proximate cause of the injury. In the present case, upon the evidence of the plaintiffs, considered most strongly for them, but for the defendant's negligence young Figone would not have been killed by the defendant's reckless employee, and the plaintiffs would not have been deprived of the support of their son.

After the nonsuit was granted, upon motion the defendant was permitted to file an amendment to his answer in which, in place of the admission of the defendant of the drawing of the gun upon a patron of the saloon in 1916 and his attempted justification of the act, the defendant averred that he had no sufficient information or belief on the subject to permit him to answer the allegations in that regard, and he

denied that the revolver was so drawn by his employee, and further denied that he was ever aware that his employee drew his revolver at any time upon any person. While amendments should be liberally allowed, that liberality should only be exercised in furtherance of justice. (Code Civ. Proc., sec. 473.) It has been declared to be a rule that a plaintiff will not be permitted on the trial to deny a fact admitted in the answer. (Bliss on Code Pleading, sec. 430; *Bank of Woodland v. Herron*, 122 Cal. 107, [54 Pac. 537]; *Hansen v. Stinehoff*, 139 Cal. 169, [72 Pac. 913]; *Rudd v. Byrnes*, 156 Cal. 639, [20 Ann. Cas. 124, 26 L. R. A. (N. S.) 134, 105 Pac. 957].) "Speaking generally, it may be said that the test as to whether or not the court has abused its discretion will depend upon whether the amendment is a permissible amendment which will perfect a cause of action otherwise imperfectly pleaded. In this case the court had tried the action, had taken all the evidence of all the parties, from which evidence it was satisfied that plaintiffs were not in possession of the land and could not prove such possession upon a new trial without gross stultification of the evidence which they had formerly given." (*Norton v. Bassett*, 158 Cal. 427, [111 Pac. 253].) In the present case, in view of the admission of the defendant and his attempted justification of the drawing of the weapon by his employee, and in view of the evidence of the witness who testified that the defendant was present upon that occasion, the denial of information concerning the fact of drawing the revolver and the denial of the fact amounted to such a stultification that the order permitting the amendment cannot be sustained. (*Spanagel v. Reay*, 47 Cal. 608.) The court could not by the order permitting the amendment to be filed nullify the evidence before the court on the motion for nonsuit. On retrial of the case, the defendant ought not be permitted to introduce evidence or put the plaintiffs to the proof of facts upon a matter already admitted of record in the case.

The judgment should be reversed and the amended answer stricken from the files.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 15, 1919.

Angellotti, C. J., Shaw, J., Wilbur, J., and Olney, J., concurred.

[Crim. No. 681. Second Appellate District, Division Two.—October 17, 1919.]

THE PEOPLE, Respondent, v. C. L. SCHROEDER,
Appellant.

- [1] **CRIMINAL LAW — EMBEZZLEMENT — ESSENTIAL ELEMENTS OF OFFENSE—SUFFICIENCY OF INFORMATION.**—The four essential elements of the offense of embezzlement are: (1) That defendant was acting in the capacity of an agent; (2) that he obtained and held the money in his trust capacity; (3) that the money belonged to his principal; and (4) that he converted it to his own use in violation of his trust; and in this prosecution the information sufficiently informed the defendant of all these material elements of the crime charged against him.
- [2] **ID.—HOLDING OF MONEY FOR BENEFIT OF PRINCIPAL—INSUFFICIENCY OF ALLEGATION—WAIVER OF DEFECT.**—Even though it does not sufficiently appear from the information in such prosecution that the defendant was holding the money for the benefit of his principal at the time of its appropriation by him, where such point is not raised by demurrer, the defect is waived.
- [3] **ID.—COLLECTION OF MONEY ON ASSIGNED CLAIM—MISAPPROPRIATION OF FUNDS—EVIDENCE—FINDING.**—Where the defendant had received, for the purposes of collection only, an assignment of a claim against a business concern for an amount of several hundred dollars, and as the agent and representative of the assignor he collected the claim and deposited the money in the bank to his own account, and when called upon by his principal to deliver the money failed to do so and admitted that he did not have it, and the evidence further disclosed that the amount was no longer to his credit in the bank, the jury was justified in finding that he had appropriated the money for a purpose not in the due and lawful execution of his trust.
- [4] **ID.—RECEIPT OF PARTIAL PAYMENTS BY AGENT—SEVERAL EMBEZZLEMENTS—IMMATERIAL QUESTION.**—In such prosecution it is unimportant to determine whether there had been an embezzlement from time to time of any of the partial payments as they were received by defendant on the collection of the assigned claim. It is sufficient that on and after the date when all of the money had been collected and was payable to his principal, defendant had withdrawn it from the bank on his own account, and under circumstances which made the question of his felonious intent one for the jury to determine.

APPEAL from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. B. Coil and Fred W. Heatherly for Appellant.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn and Arthur Keetch, Deputies Attorney-General, and Jerry H. Powell for Respondent.

SLOANE, J.—The appellant was convicted of embezzlement.

The opening brief is devoted largely to a discussion of the alleged insufficiency of the information to state the offense charged. The information, so far as its essential parts are concerned, is as follows:

“The said C. L. Schroeder is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of embezzlement, a felony, committed as follows: That the said C. L. Schroeder on or about the 15th day of November, 1917, at and in the County of Los Angeles, State of California, was the agent, collector and trustee of one D. M. Ward, doing business under the name and style of Ward Iron Works, and then and there, by virtue of his said employment and trust as such agent, collector and trustee, came into the care, possession, custody and control of him, the said C. L. Schroeder, the sum of Four Hundred Twenty and 82/100 Dollars (\$420.82) in gold coin of the United States, and of the personal property of the said D. M. Ward, doing business as aforesaid.

“And he, the said C. L. Schroeder, after the said sum of Four Hundred Twenty and 82/100 Dollars (\$420.82) had come into his care, possession, custody and control, as aforesaid, did then and there, to-wit, on or about the said 15th day of November, 1917, at and in the County of Los Angeles, State of California, willfully, unlawfully, fraudulently and feloniously convert, embezzle and appropriate the said sum of money to his own use, and to uses and purposes not in the due and lawful execution of his said trust as such agent, collector and trustee, as aforesaid.

“Contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California.”

[1] We think this information substantially meets all the requirements to charge the offense of embezzlement by an agent or trustee, under the provisions of section 508 of the Penal Code.

The four essential allegations for such an information are: (1) That defendant was acting in the capacity of an agent; (2) that he obtained and held the money in this trust capacity; (3) that the money belonged to his principal; and (4) that he converted it to his own use in violation of his trust. (*People v. Hemple*, 4 Cal. App. 120, [87 Pac. 227]; *Ex parte Hedley*, 31 Cal. 109.) All that is required is that these essential facts be set forth in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended. (Pen. Code, sec. 959.) There is very little ground to doubt that this defendant was sufficiently informed of all these material elements of the crime charged against him. [2] There might be some room to question that there was a sufficient allegation that he was holding the money for the benefit of his principal at the time of its appropriation by him, if the point had been raised by demurrer. But, at most, the defect in the pleading is one of indefiniteness, which was waived by failure to demur. (Pen. Code, secs. 1012, 1185.)

Numerous alleged errors in the admission and exclusion of evidence are averred without particular specification, in most instances, of the grounds of the exceptions to the rulings. We will not attempt to review them separately, but have read the entire record in the case, and are satisfied that whatever errors or irregularities, if any, there may have been in the trial, none of these are of such a prejudicial character as to justify the conclusion that there has been a miscarriage of justice.

[3] The evidence clearly shows that the defendant received, for the purposes of collection only, an assignment of a claim against a business concern for an amount of several hundred dollars; that as the agent and representative of the assignor he collected the claim, deposited the money in bank to his own account, or in the name under which he was doing business; and that when called upon by his principal to deliver the money, failed to do so and admitted that he did not have it; and the evidence further disclosed that the amount was no longer to his credit in the bank.

It was a trust fund that he had no right to use for any purpose without the consent of his principal. He subsequently repaid a portion of the amount, but some \$420 was never paid. The jury was justified in finding that he had appropriated the money for a purpose not in the due and lawful execution of his trust. (*People v. McMahon*, 4 Cal. App. 225, [87 Pac. 404].)

[4] It is unimportant to determine whether there had been an embezzlement from time to time of any of the partial payments as they were received by defendant on the collection of this assigned claim. It is sufficient that on and after the date alleged—the 15th of November—when all of the money had been collected and was payable to his principal, defendant had withdrawn it from the bank on his own account, and under circumstances which made the question of his felonious intent one for the jury to determine.

The judgment is affirmed.

Finlayson, P. J., and Thomas, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 15, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2255. Second Appellate District, Division Two.—October 17, 1919.]

JAMES H. PENCE, Appellant, v. JULIET N. MARTIN
et al., Respondents.

[1] MECHANICS' LIENS—TIME FOR FILING—CESSATION OF WORK.—A claim of lien by a subcontractor not filed until more than nine months after the constructive completion of the contract, there having been a complete cessation and abandonment of the work by the contractor, is not filed in time.

[2] ID.—FAILURE TO FILE NOTICE IN TIME—ACTION TO FORECLOSE—DEFENSES.—In an action to foreclose a mechanic's lien, the defendants are not estopped from setting up as a defense the plain-

tiff's failure to file the notice of claim of lien within the statutory period, where there is no showing that they had by act or representation willfully and fraudulently led him to forego his rights of lien.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. E. Joslin for Appellant.

Milton K. Young and Byron Coleman for Respondents.

SLOANE, J.—The plaintiff brought this action to foreclose a mechanic's lien. The only question on the appeal from judgment in favor of defendants is as to whether or not plaintiff's claim of lien was filed within the time allowed by law. The appeal is taken on the judgment-roll alone, and the findings must be presumed to be in accordance with proof presented on the trial.

According to the findings, the defendant Juliet N. Martin, owner of the real property involved, entered into a contract with W. W. Paden, whereby Paden agreed to erect an apartment house on the land of defendant Martin for the agreed price of forty-three thousand five hundred dollars, and accepted from said defendant certain mortgages and securities on the premises in question, and on other property of said defendant, for the contract price. From the negotiation and sale of these securities he was to raise the money to build the house and receive his profits. The contract was not recorded. The plaintiff Pence entered into an agreement with Paden whereby, as subcontractor, he undertook to furnish the materials and labor for the carpenter work.

[1] The work of construction was begun, and claims on behalf of the plaintiff accrued to the amount of \$425. Thereafter Paden, being unable to find a market for his securities, discontinued work under his contract for want of funds, and there was a complete cessation of all work on the building from on or about the 30th of January, 1915. Work was never resumed upon the building by the contractor Paden, or under this contract. About the middle of

October, 1915, Paden, under some sort of a settlement which is not disclosed, returned the securities that had been delivered to him by the defendant Juliet N. Martin, and she thereupon entered into arrangements with the defendants Jones, Title Guarantee and Trust Company, and Fidelity Savings and Loan Association whereby they furnished her with money to complete the building, and on the 25th of October, work was resumed under entirely new and independent contracts. The plaintiff Pence was at no time, prior to shortly before the resumption of work, notified that he would not be permitted to carry out his subcontract with Paden, but he knew of the discontinuance of work during all this period, and was informed, between the 4th and 25th of October, that the defendant Martin had procured funds to complete her building, and that work would be resumed under a new contract, and that he, together with other subcontractors under Paden, would be given first chance to bid for the work under new contracts. The plaintiff did not avail himself of this offer. Within thirty days after the resumption of work on the building under the new contract, namely, the 16th of November, 1915, plaintiff, taking the execution of the new arrangement as a repudiation of his contract, filed his notice of lien. This was some nine months after cessation of work under the Paden contracts, and after plaintiff's last work as subcontractor. The court declares in its findings that there was not a temporary suspension of the work on January 30, 1915, for the convenience of the owner, as claimed by appellant, but that there was a complete cessation and abandonment of such work by reason of the fact that the contractor Paden was unable to continue the same because of inability to raise funds on his securities; and on this appeal this finding is not subject to impeachment for want of evidence.

Under section 1187 of the Code of Civil Procedure, the plaintiff had thirty days after he had ceased to labor or furnish materials, or thirty days after the completion of the original contract under which he was employed, in which to file his notice of lien. Under the provisions of the same section, cessation from labor for thirty days is deemed equivalent to a completion, for all purposes of the mechanic's lien law. Under the further provision of this section, by reason of the owner not having filed a notice of completion

or cessation of labor, the time within which plaintiff's notice of lien might have been filed was extended not to exceed ninety days from the constructive statutory period of completion. (*Buell v. Brown*, 131 Cal. 159, [63 Pac. 167].) His claim of lien was not filed for several months after the expiration of the ninety days. There has been no change in the legal effect of the code provision making thirty days' cessation from labor a constructive completion of the work contracted for, by the various amendments to the mechanic's lien law since 1887; and, so far as has been called to our attention, the courts have held such constructive completion of the contract as conclusive on the rights of laborers and subcontractors as an actual completion of the building. (*Kerchoff-Cuzner M. & L. Co. v. Olmstead*, 85 Cal. 80, [24 Pac. 648]; *Johnson v. La Grave*, 102 Cal. 324, [36 Pac. 651]; *Robison v. Mitchel*, 159 Cal. 581, [114 Pac. 984].) The trial court had no alternative to finding that the plaintiff's claim of lien was not filed in time.

[2] There is no foundation in the record for appellant's contention that the plaintiff was misled or "toll'd" into a false sense of security by the defendants, or that there was any collusion between Paden and the other defendants to deceive him. Neither the allegations of the complaint nor the findings of the court justify such a conclusion. There was no privity of contract between him and the owner of the property, or any of the defendants, other than Paden. The contract created no liability against the owner of the premises, other than such as might arise under a valid assertion of the lien. Defendants owed appellant no duty to protect his rights. His only claim against the property was his right to a lien, as incident to his employment under the Paden contract, and that was dependent upon his strict compliance with the requirements of the mechanic's lien law. If the defendants had by act or representation willfully and fraudulently led him to forego his rights of lien, they would doubtless be estopped from setting up as a defense his failure to file the notice within the statutory time; but by merely standing by and permitting him to sleep on his rights, they are not estopped. It does not, however, appear by the record here that the defendants, or either of them, were even aware of the fact that Paden had not settled in full with his subcontractor.

The findings of the trial court fully support the judgment, and cover all the issues raised by the pleadings which could affect the rights of plaintiff.

The judgment is affirmed.

Finlayson, P. J., and Thomas J., concurred.

[Civ. No. 2991. First Appellate District, Division One—October 18, 1919.]

ELGIN R. SHEPARD, Appellant, v. LAURA S. HUNT,
Respondent.

- [1] **PROMISSORY NOTE—CONSIDERATION—EVIDENCE.**—In this action to recover on a promissory note which the plaintiff claimed was indorsed and delivered to him prior to maturity, in due course of trade and for a valuable consideration, the evidence was sufficient to sustain the finding of the trial court that there was no consideration for the execution of the note.
- [2] **ID.—INTENT OF PARTIES—CONTEMPORANEOUS CONTRACT.**—Where a promissory note is given as part payment for a contract, found to be without value, not only is it necessary for the court to look to the provisions of the contract other than the provision containing the recital as to the consideration therefor in order to ascertain the true intent of the parties as expressed in the terms of their contract, but it is proper to look beyond the instrument itself in order to determine the real consideration for the payment made by the defendant, even though a consideration different than that stated in the written agreement might be discovered.
- [3] **ID.—PURCHASE IN GOOD FAITH—EVIDENCE—JURISDICTION OF APPELLATE COURT.**—In this action to recover on a promissory note which the plaintiff claimed was indorsed and delivered to him prior to maturity, in due course of trade and for a valuable consideration, the findings of the trial court to the effect that the plaintiff did not purchase the note sued upon in good faith and in the ordinary course of business find ample support in the evidence. It is not for the appellate court to determine where the preponderance of the proof is; it need look no further into the record than to discover evidence of a substantial nature which, to a rational mind, may be deemed to support the findings in the behalf stated.
- [4] **ID.—CREDIBILITY OF WITNESSES—PROVINCE OF TRIAL COURT—CONSIDERATION OF INDIRECT EVIDENCE.**—In such action the trial court

was the exclusive judge of the credibility of the witnesses at the trial of the action, and while the plaintiff disclaimed any knowledge impeaching the integrity of the note in suit at the time it was indorsed and delivered to him, and his testimony was corroborated by the indorser of the note, the court was not bound, under the circumstances shown by the evidence, to accept as true the testimony of the plaintiff merely because it was direct and was not directly contradicted, but was duty-bound to consider both the direct and indirect evidence bearing upon the nature of the transfer and what was in the plaintiff's mind at the time.

[5] **ID.—PRIMA FACIE CASE—BURDEN OF PROOF.**—After the plaintiff in such action had established a *prima facie* case, the burden was cast upon the defendant to show that the note in suit was not founded upon a sufficient consideration. Such proof having been adduced by the defendant, the burden of showing that he was an innocent holder passed to the plaintiff.

[6] **ID.—INNOCENT HOLDER—EVIDENCE.**—The indorsee of a promissory note may show that he is an innocent holder by proof that he purchased the note before maturity for value and in the usual course of business, unless the evidence shows that the note was taken under circumstances creating the presumption that he knew or should have known the facts impeaching its validity.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester T. Price, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Fred M. Arnoldy for Appellant.

C. F. Holland and Charles E. Dow for Respondent.

BARDIN, J., pro tem.—Plaintiff sued to recover on a promissory note executed by Laura S. Hunt, in the state of Minnesota, on June 3, 1913, for \$2,583, payable to Sereen L. Webb, on or before one year after date, and which plaintiff claims was indorsed and delivered to him prior to maturity, in due course of trade and for a valuable consideration.

The action was dismissed as to Sereen L. Webb. The judgment was against the plaintiff, from which he prosecutes this appeal.

Responsive to the issues raised by the answer of defendant Hunt, hereinafter referred to as the defendant, the court

found, among other facts, that on or about March 21, 1914, Sereen L. Webb, the payee named in the note, indorsed and delivered said note to plaintiff and that said plaintiff gave for said note the sum of fifty dollars in money, and his own promissory note in the principal sum of two thousand five hundred dollars, payable one year after date to Sereen L. Webb, without interest; that no part of the principal or interest of the note sued upon has been paid; that said note was given in payment of a certain written contract, presently to be referred to, entered into between defendant and Domestic Utilities Manufacturing Company, a corporation, of which Sereen L. Webb was an agent, which contract was of no value whatever, and that there was no consideration for said note. The court also found that the plaintiff did not purchase said note in ordinary course of business, nor in good faith; that on or about June 3, 1914, Sereen L. Webb waived presentment, demand, and notice of protest of said note, at which time plaintiff knew that said note had been made without consideration and that defendant, prior to the maturity of said note, notified plaintiff that said note was without consideration and void and that she would not pay the same; and that said plaintiff had at said time paid but fifty dollars in money for said note, and nothing on his own promissory note payable to Sereen L. Webb.

The principal grounds urged for the reversal of the judgment, and the only ones meriting discussion, are these: That the evidence does not sustain the findings of the court (1) that there was no consideration for the note sued upon; and (2) that plaintiff did not purchase the note in the ordinary course of business and in good faith.

[1] Directing our attention to the evidence adduced at the trial on the question of the alleged lack of consideration for the execution of the note sued upon, we believe that there is sufficient evidence to sustain the finding of the court on that subject. The execution of the note grew out of a transaction wherein Sereen L. Webb, as the agent of Domestic Utilities Company, for the consideration of five thousand dollars, sold to defendant 1,667 clothes-washers (subsequently delivered), together with certain so-called rights relating to prospective sales of additional washers and of the prospective sales also of other like contracts

when and if willing purchasers might be found, and which sales of clothes-washers and contracts would, if consummated, yield remunerative return in commissions and profits to the defendant.

At the time the contract was entered into Screen L. Webb delivered to the defendant a receipt in the words and figures following:

“Minneapolis, Minnesota.

“June 3rd, 1913.

“Received of Mrs. Laura S. Hunt five hundred dollars cash on account of contract of Domestic Utilities Company, same to be used on account of 1667 washers, also note for \$1167 for same purpose, also note for \$2583, also note for seven hundred fifty (\$750) dollars in all, making \$5000.00 for said contract.

“(Signed) SCREEN L. WEBB.”

The defendant claimed below, and she now claims, that the note sued upon was intended as payment for a contract which proved to be valueless, for reasons existing at the time the agreement was entered into, and also because of conditions that arose after that time. It is contended in plaintiff's behalf that the defendant is precluded from making any inquiry as to what the note sued upon was in fact given for, because of a recital in the contract between the defendant and the Domestic Utilities Manufacturing Company as follows:

“Now, therefore, to whom it may concern, be it known that for and in consideration of five thousand dollars (\$5,000) this day paid to the ‘Company,’ the receipt of which is hereby acknowledged, the said ‘company’ has sold unto the ‘Agent’ 1667 Vacuum Clothes Washers.”

Perusal of the entire contract discloses that it was not intended that the five thousand dollar payment referred to should be limited to the purchase price of 1,667 vacuum clothes-washers. On the contrary, it very plainly appears that defendant was purchasing certain presumed rights and privileges separate and distinct from and beyond the 1,667 washers, and which she was led to believe might prove to be very valuable. These rights, in part, consisted of the power conferred upon the defendant to reserve territory in which to exploit the wares of the company, and to sell such

wares in unreserved territory; the authority to appoint sub-agents, the right to sell wholesale lots of washers under prescribed conditions; and also the right to sell washers in lots of 1,667, and rights and privileges identical in terms with those sold to the defendant.

[2] Not only was it necessary for the trial court to look to the other provisions of the contract in order to ascertain the true intent of the parties as expressed in the terms of their contract, but it was proper to look beyond the instrument itself in order to determine the real consideration for the payment made by the defendant (Code Civ. Proc., sec. 1962, subd. 2; *Field v. Austin*, 131 Cal. 379, [63 Pac. 692]), even though a consideration different than that stated in the written agreement might thereby be discovered. And for the same reason it was proper to determine the consideration paid for the 1,667 washers, found by the court to be \$1,667, and represented by five hundred dollars in cash and a note for \$1,167. It follows, then, that the promissory note sued upon was given as part payment for a contract which the court found to be without value, and the evidence supports such finding.

There was testimony to the effect that it was impossible to effect sales of the washers under the terms prescribed in the agreement. Also the company engaged in the manufacture of these goods and their sale under the unusual plan shown by the contract referred to was compelled, for reasons not clearly appearing in the record, to cease to operate under its contract with the defendant, several months before the maturity of the note in suit. Thus the defendant was prevented from reaping any part of the golden harvest purporting to be provided for her in the "contract."

We pass now to the consideration of the question of whether the record discloses sufficient evidence to sustain the finding of the court that the plaintiff did not purchase the note in suit in course of ordinary business or in good faith.

The circumstances surrounding the transfer of the promissory note from Sereen L. Webb to plaintiff, which took place in the state of Minnesota, are substantially as follows: A day or two before March 21, 1914, the plaintiff, while dining at the home of Mrs. Webb in Minneapolis, was requested by his hostess to purchase this note. At that

time he had been acquainted with her for several years. They had formerly been co-workers in attempting the resuscitation of a certain mining company which had met with serious difficulties of a financial nature. The plaintiff at the time in March referred to above was conducting a photographic business in Minneapolis. He testified that he could not recall ever before purchasing a promissory note. At the time referred to he was already indebted to Mrs. Webb in the sum of three thousand dollars for borrowed money evidenced by his promissory note to her dated February 28, 1914. He knew that Mrs. Webb had been interested in the Domestic Utilities Manufacturing Company and had been selling its "contracts" during the summer of 1913. At the time of the indorsement and delivery of the note in suit, he was not acquainted with the defendant but was informed that she was a resident of Los Angeles, California. He made no inquiries concerning defendant's financial standing, contenting himself upon that subject with Mrs. Webb's statement that the note sued upon was good and that she would become an indorser thereon (which in fact she did), so that the plaintiff would not take any risk whatever in the matter.

The plaintiff further testified that he had not the slightest information as to what the note was given for, and made no inquiries in that respect; that Mrs. Webb had stated to him that the reason she requested the plaintiff to purchase the note was that it had been made by a friend who would ask for an extension of time for payment of the note. Plaintiff knew at the time that Mrs. Webb was not desirous of selling the note because of need of money. He testified that he had read law to some extent and knew at the time of transfer "that a negotiable instrument in the hands of an innocent purchaser for value could be enforced, even though in fact not founded upon a consideration, provided the purchaser did not know it."

It may be here added that subsequent to the maturity of the note sued upon, the plaintiff was informed by Mrs. Webb that she had negotiated the note so as to get it into the hands of an innocent purchaser, that a fancied defect in the note might thereby be corrected.

In consideration of the transfer of the note in suit to the plaintiff he paid to Mrs. Webb fifty dollars in cash, apparently belonging to his wife, but furnished to him for the occasion, and handed Mrs. Webb his own unsecured promissory note for two thousand five hundred dollars, payable one year after date without interest.

About the 15th of May, 1914, the plaintiff wrote to defendant that he would expect payment of the \$2,583 note when due, to which letter Mrs. Hunt replied in effect that she would not pay the note and that it grew out of a fraudulent transaction. On May 31, 1914, the plaintiff answered defendant's communication, including in his reply the following sentence: "Am also surprised to learn that if you bought into that Domestic Utilities scheme and lost thereby that you should ever complain of any result therefrom for of all the wild-cat schemes I ever investigated that beats them all"; and also the following: "You have no legal defense to your note, which is a simple promissory note, when the same passes into the hands of an innocent purchaser for a valuable consideration."

About June 6, 1914, the plaintiff called upon Mrs. Webb, at which time he claims he learned for the first time the full details of the execution of the note sued upon. There was then exhibited to him a letter previously sent to Mrs. Webb by the defendant, dated March 15, 1914, wherein the defendant disclaimed responsibility under the note sued upon, basing her denial of liability upon grounds which went to the integrity of the note in its inception. Mrs. Webb continued to hold the two thousand five hundred dollar note given her by plaintiff and which was apparently paid on March 15, 1915, by transferring to her certain lots of land. The present action was begun in April, 1915, and at the trial plaintiff's action was dismissed as to Mrs. Webb.

[3] We believe that the foregoing rather extended summarization of the evidence serves to show that the findings of the trial court to the effect that the plaintiff did not purchase the note sued upon in good faith and in the ordinary course of business, finds ample support in the evidence. It is not for us to determine where the preponderance of the proof is; we need not look further into the record than to discover evidence of a substantial nature

which, to a rational mind, may be deemed to support the findings in the behalf stated.

[4] The trial court was the exclusive judge of the credibility of the witnesses at the trial of the action. While the plaintiff disclaimed any knowledge impeaching the integrity of the note in suit at the time it was indorsed and delivered to him, and his testimony was corroborated by the indorser of the note, yet the trial court was under no legal compulsion to accept such testimony as true and thus to exclude all inferences logically to be drawn from other admitted or proven facts. The question of the good faith of the plaintiff and the nature of the transfer as to whether it was made in usual course of business were questions entirely within the province of the court for determination. We believe we would not be justified in holding, as a matter of law, that the evidence is insufficient to support the particular findings referred to. The court was not bound, under the circumstances shown by the evidence, to accept as true the testimony of the plaintiff merely because it was direct and was not directly contradicted. The trial court was duty-bound to consider both the direct and indirect evidence bearing upon the nature of the transfer and what was in the plaintiff's mind at the time, and we are satisfied that it was not amiss in the discharge of that duty. For us to say that the transactions such as passed between Mrs. Webb and the plaintiff must be accepted as related by the parties principal, because not contradicted by direct evidence, would be to put a premium upon perjury and to take from our trial courts means for the discovery of truth, now regarded as trustworthy and essential.

[5] After the plaintiff had established a *prima facie* case, the burden was cast upon the defendant to show that the note in suit was not founded upon a sufficient consideration. Such proof having been adduced by the defendant, the burden of showing that he was an innocent holder passed to the plaintiff. [6] The California cases bearing upon this particular subject hold that a party situated as was the plaintiff may show that he is an innocent holder by proof that he purchased the note before maturity for value and in the usual course of business, unless the evidence shows that the note was taken under circumstances creating the presumption that he knew or should have known the

facts impeaching its validity. (*Blochman Commercial etc. Bank v. Moretti*, 177 Cal. 256, [170 Pac. 419].)

In the case at bar the plaintiff claims that he met the requirements of the law by showing that he had purchased the note before maturity and in the usual course of business, paying an adequate consideration therefor. The issue as to whether he had purchased the note in good faith and in the usual course of business was decided against him, and it is our conclusion that such finding is supported by the evidence.

The claim is made that, because of the state of the pleadings, the court committed error in receiving in evidence the printed reports of certain decisions of the supreme court of the state of Minnesota, in which state it will be recalled that the note in suit and its transfer was made to plaintiff. In view of the fact that it is our belief that the judgment should be affirmed under the laws of either of the states referred to, this objection becomes of no importance.

The judgment is affirmed.

Richards, J., and Waste, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 15, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Crim. No. 482. Third Appellate District.—October 18, 1919.]

THE PEOPLE, Respondent, v. GEORGE W. PECK,
Appellant.

[1] CRIMINAL LAW—EXTORTION—WHO MAY COMMIT—ROBBERY—CONSENT.—Under section 518 of the Penal Code the crime of extortion may be committed by any person, but to constitute the crime of extortion in any case, the taking of the property must be with

1. Extortion distinguished from robbery, note, 116 Am. St. Rep. 449.

the consent of the person from whom it is obtained; and it is the fact that the property taken must be with the consent of the person from whom it is obtained that distinguishes the crime of extortion from that of robbery, the latter crime being defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

- [2] **ID.—TAKING WITH CONSENT—QUESTION FOR JURY.**—In a prosecution for the crime of extortion, the question whether the money was obtained with or without the consent of the person from whom it was taken is a question to be determined by the jury from the circumstances, as shown by the evidence, under which the transaction occurred.
- [3] **ID.—WHAT CONSTITUTES TAKING WITH CONSENT.**—In a legal sense, in a case of this kind, money or property is obtained from a person with his consent if he, with apparent willingness, gives it to the party obtaining it, with the understanding that thus he is to save himself from some personal calamity or injury, notwithstanding that within himself he may still protest against the circumstances requiring him to dispose of his money in that way or for such a purpose.
- [4] **ID.—PREVIOUS CHARGE OF DEFENDANT WITH ROBBERY—ADMISSION OF COMPLAINT—INSTRUCTIONS.**—In a prosecution for the crime of extortion, the point that the court erred in sustaining the district attorney's objection to the admission in evidence of a prior complaint based upon the same transaction and sworn to by the complaining witness, charging the defendant with the crime of robbery, does not possess much force where such prior complaint was read to the jury, and the jury was not instructed to disregard it, the complaining witness having previously been allowed to say that he swore to the complaint and that he recognized his signature to the document.
- [5] **ID.—IMPEACHMENT—CROSS-EXAMINATION — EXTRAJUDICIAL STATEMENTS.**—In such prosecution, for the purpose of impeachment of the testimony of a witness for the defense, it was proper to permit the district attorney, on cross-examination, to question such witness as to certain statements made by him to the complaining witness, though not made in the presence of the defendant.
- [6] **ID.—LIMITED PURPOSE OF TESTIMONY—INSTRUCTIONS—DUTY OF COUNSEL.**—The proper practice in such a case is for the party against whose interests such impeaching testimony is given to request the court to explain to the jury in its charge that such testimony is to be limited in its effect to the specific purpose for which it is allowed, and that the jury are likewise to be restricted in their consideration of it. Where no such instruction is proposed

by the defendant, he is without a legal reason for complaining against a failure of the court so to instruct the jury.

- [7] **ID.—INSTRUCTIONS—DUTY OF COURT IN CRIMINAL CASES.**—It is the duty of a court in criminal cases to give, *sua sponte*, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases, but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them.
- [8] **ID.—PREJUDICIAL QUESTIONS—DUTY OF OPPOSING COUNSEL.**—Where a question asked of a witness for the prosecution, whereby it is sought to prove certain extrajudicial statements of a witness for the defense for the purpose of contradicting or impeaching certain portions of the testimony of the latter, is prejudicial to the defendant, counsel for defendant should move the court to strike out the question and specially request the court to instruct or admonish the jury not to consider it in determining the question of the guilt or innocence of the accused; and his failure to take that course leaves him in no position to complain on appeal.
- [9] **ID.—MISCONDUCT OF DISTRICT ATTORNEY—REMARKS NOT PREJUDICIAL.**—Where in a prosecution for the crime of extortion the defendant tried to prove that the whole affair was a joke, the remarks of the district attorney, "I will make the same kind of a complaint against the defendant, or any other citizen of Plumas County, that perpetrates the same kind of a joke, and I will keep on doing it until the treasury of this county is empty," were not prejudicial to the rights of the defendant, neither did they constitute a threat of any character or anything calculated unjustly to influence the jury against the defendant.

APPEAL from a judgment of the Superior Court of Plumas County. J. O. Moncur, Judge. Affirmed.

The facts are stated in the opinion of the court.

M. C. Kerr for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant, jointly with one Elton Frazier, was charged with the crime of extortion. He demanded and received a separate trial, was found guilty by the jury, and was sentenced to state's prison, and now prosecutes this appeal from the judgment.

On January 27, 1919, the prosecuting witness, Louis Wing, was living on a farm near Crescent Mills, in Plumas County. He testified that he had known the defendant Peck for fifteen or twenty years and the defendant Frazier for about three years; that, at about five minutes to 3, on the morning of January 27, 1919, the defendants came to his house, knocked at the door, and asked to come in. Peck said he was cold and asked Wing to build a fire, which he did. As to what then occurred, Wing testified: "Peck says, 'Take a chair and sit down and be sociable,' which I did in my underclothes, and he says to me, 'Will you dance to my fiddling?' I says, 'I have, George, and I guess I can again,' and he says, 'Well, you are going to, now.' I looked up—he had a gun stuck in my face. I asked him what he would do. He says he was going to kill me. I asked him what I had done. There was a rock put in some grain at the ranch when he was threshing there and the grain didn't belong to me, but it didn't do any harm. The rock was found before it went into the machine. He said I knew how it got in there and I was going to tell him. I told him I was just as innocent as a new-born baby and I didn't know who put it in there. . . . And he kept on going to make me tell." There was some further conversation in which Frazier said Wing had called him a slacker, which the latter denied. The witness testified that Peck said, "You know very well if we go away and leave you here you will get me arrested." Wing said, "I promised him faithfully that I would not if he would let me go. At that time he ordered Elton Frazier to pull that gun and he did, but he never pointed it at me. . . . George Peck wanted me to put up something to keep my mouth shut after I faithfully promised him I wouldn't get him arrested, which I did; I put up \$62.25. It was \$63.25 and I asked him for one dollar back, and he gave me a dollar and took the \$62.25 away with them when they left the house." It appeared that the money was in Wing's pants pocket in his bedroom. He testified: "Peck ordered Frazier to go and get it and Frazier went and got it and counted it out on the table, and I asked him for this dollar back and he gave it to me and he shut the purse up and handed it to Peck and that is the last I see of the money until I went back from here and it was given to me by different parties."

Asked why he permitted the defendants to take the money, Wing said, "Through fear, I had to give it up to them. I would give them anything I got for to get them to stop." He said he told them where the money was and made no objection to their taking it. He was asked if defendants gave any reason for taking the money, and answered, "It was put up as a forfeit so I wouldn't get them arrested for pulling those guns on me and threatening my life."

It further appears that, on the afternoon of the twenty-seventh day of January, the defendant was at the home of his brother, Joseph Peck, residing a short distance from the house occupied by Wing and in which the trouble occurred. Mrs. Peck, the wife of Joseph, remarked to the defendant that she saw Wing and the "Stampfli bunch" (the Stampflis were residents of the Crescent Mills section and friends of Wing), going toward Quincy (the county seat of Plumas County), and, she said, "I wondered what they were going for," and the defendant replied, "I guess he was going over to have me arrested." Mrs. Peck asked defendant what reason Wing had for having him arrested, and the accused explained the episode occurring at Wing's house early that morning, but said it was all merely a joke or "done for fun." The defendant then left his brother's house and within a few minutes thereafter Glen Peck, son of Joseph and Mrs. Peck, appeared at the latter's home, gave his mother Wing's purse and the money taken from Wing by defendant and Frazier, and requested her to deliver the purse and its contents to Wing. Mrs. Peck took the purse and the money to Wing's house and placed them on a table in one of the rooms. Wing, on returning home, found the purse and the full amount of money taken from him as above explained.

It is first contended by appellant that the crime committed, if any, was robbery and not extortion. This question was first raised by a motion made by defendant that the court instruct the jury to bring in a verdict of not guilty, after the district attorney, in his opening statement, had told the jury that the defendant had taken the money from Wing by putting him in fear of bodily injury because of the display of firearms.

1. At the common law, extortion was confined to the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due or before it is due, and it is so defined. In most of the states the crime of extortion is defined by statutes which are substantially declaratory of the common-law offense. (8 B. C. L. 315.) In some instances, however, the statutory definitions have extended the scope of the offense beyond that of the common law so as to include the unlawful taking of money or thing of value of another by any person, whether a public officer or a private individual, and this is so in California, as will be observed from the language of section 518 of the Penal Code, which reads as follows: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

[1] Thus, it will be noted, in this state the crime may be committed by any person, but to constitute the crime of extortion in any case, the taking of the property must be with the consent of the person from whom it is obtained; and it is the fact that the property taken must be *with the consent* of the person from whom it is obtained that distinguishes the crime of extortion from that of robbery, the latter crime being defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, *and against his will*, accomplished by means of force or fear." (Pen. Code, sec. 211.)

From the evidence, the jury were warranted in finding these facts, as impliedly they did: That the defendant assaulted and threatened to inflict bodily injury upon Wing upon the pretext that the latter had said some unkind things about the accused; that Wing was very much frightened and was possessed of a fear that the defendant and his companion, Frazier, had called at his house with the intention of injuring him and that they intended to do so; that after Wing explained and protested that he had not made the statements about the defendant attributed to him by the latter, the accused asked Wing to promise him that he (Wing) would not institute a proceeding in the courts against him for assault; that Wing promised not to do so if the defendant would not injure him, and that thereupon

the defendant asked Wing if he had any money in his possession, to which Wing replied affirmatively, stating the amount; that the defendant then demanded of Wing a delivery to him of the money, to be held by him (defendant) as an earnest of Wing's good faith in the agreement that he would not prosecute the accused; that Wing believed that that was the purpose for which the accused wanted the money and, being in fear that the defendant would inflict bodily injury upon him, if, indeed, not take his life, and to save himself from injury, willingly told Frazier where to get the money, and that Frazier obtained it and turned it over to the accused with the consent of Wing, who then believed that the money would be returned to him by the accused if he (Wing) should make no complaint against Peck for the assault. The jury were further warranted in finding that, as a matter of fact, it was the original intention of the defendant to retain, steal, and appropriate the money so obtained to his own use, and that he would have done so but for the fact that later in the day of the visit of himself and Frazier to Wing's house he had been informed by his sister-in-law that she had seen Wing and some of his friends going in the direction of the county seat of Plumas County, from which circumstance he surmised and expressed the conjecture that Wing's purpose in going to the county seat was to swear to a complaint against him, and that, actuated by the fear that he would be arrested and prosecuted for taking the money, he caused the money to be returned to Wing. Upon these facts, which we repeat are clearly deducible from the evidence, the jury were justified in concluding and finding that the crime of extortion had been committed. In brief, thus they were justified in finding, if they believed the evidence, as manifestly they did, that the money was obtained by the defendant from Wing with the latter's consent, "induced by a wrongful use of fear."

2. Defendant's counsel asked the prosecuting witness upon cross-examination whether the money was taken by defendant "without his [the said witness] consent." To that question an objection by the district attorney on the usual

grounds and on the special ground that it called for the conclusion of the witness was sustained by the court.

We can see no legal objection to the ruling. [2] Whether the money was obtained from Wing with or without his consent was a question to be determined by the jury from the circumstances, as shown by the evidence, under which the transaction occurred. Besides, it would be a difficult question for a lay witness to answer so that a jury of laymen would understand the answer. Wing could under the circumstances have consented to the taking of the money by Peck, and yet protest in his own heart against his money being taken for that purpose. A man, under certain circumstances, may loan another a small sum of money, knowing to a moral certainty at the time he loaned it that he would never get it back, and so mentally reserve a "kick" or a protest against disposing of his money in that way. Thus he would consent to parting with his money, but under protest with himself or not with that free consent or willingness that he would pay out money to satisfy an obligation or to subserve some charitable or useful public purpose. It is more than probable that such was Wing's attitude of mind with reference to the transaction, but if he had attempted thus to explain it on the witness-stand he would most likely not only himself have become confused and given an unintelligible representation of the fact, but would have so beclouded the issue as to that element of the offense as to have made it difficult for laymen to decide. [3] In a legal sense, in a case of this kind, money or property is obtained from a person with his consent if he with apparent willingness gives it to the party obtaining it with the understanding that thus he is to save himself from some personal calamity or injury, notwithstanding that within himself he may still protest against the circumstances requiring him to dispose of his money in that way or for such a purpose. Wing repeatedly testified that the money was delivered to the defendant as "a forfeit"—that is, as a guaranty that he would not institute criminal proceedings against Peck for the assault the latter made upon him with a deadly weapon—and that the money was to be returned to him; that, in other words, he put

the money up as "a forfeit" for the purpose of averting injury to himself at the hands of the defendant, the same to be returned to him if he did not prosecute Peck. Indeed, he said that he would readily have done anything he could do to save himself from being injured. With this evidence before them and the enlightenment imparted to them by the court upon the law of the case, the jury themselves were abundantly able to decide the question intelligently and justly. Hence, it was eminently proper in this case for the court to sustain the objection and so leave entirely to the jury the determination, under its instructions, of the question whether the money was obtained by the defendant with or without the consent of Wing. It may be suggested, however, that had counsel asked Wing whether he had *given* his consent to the defendant to take the money, the question would then have been in a form which would the more likely have elicited in the answer of the witness the statement of a fact.

[4] 3. For the purposes of impeachment, counsel for the defendant, having first elicited from Wing the admission that he had, prior to the filing of the charge of extortion against Peck, sworn to a complaint, based upon the transaction upon which the charge here was founded, charging the defendant with the crime of robbery, offered the complaint charging the latter crime in evidence. Counsel then read before the jury and into the record the robbery complaint. Thereupon an objection by the district attorney was interposed to the admission in evidence of said complaint. Before the court ruled on the objection, defendant's counsel again asked that the complaint be allowed to stand in the record, to be designated or marked as "defendant's exhibit one for this case." The court then ordered that it "be marked as offered as defendant's exhibit one in this case," but sustained the objection of the district attorney. Defendant's counsel then asked Wing if he swore to "that complaint in the justice's court," and to that question the court sustained the people's objection, saying to defendant's counsel, "I think you have sufficient record now for that, Mr. Kerr, and we will not go into it further." The witness, Wing, had previously, without ob-

jection, been allowed to say in response to a question by defendant's counsel that he swore to the complaint in the justice's court and that he recognized his signature to the document. No motion was made to strike the complaint from the record after defendant's counsel read it into the record, and from the court's language in ruling against further inquiry into the matter it is evident that the court considered and understood that the complaint was in the record. At any rate, it having been read to the jury and not stricken out and the jury not having been instructed to disregard it, it was in the record for all practical purposes. Hence, the point sought to be maintained here that the court erred in sustaining the district attorney's objection to the admission of the complaint after that document had gone into the record and before the jury does not appear to us as possessing much force. The defendant got the full benefit of the evidence and we cannot see what more he could have obtained had the court not sustained the objection.

[5] 4. Elton Frazier, who accompanied the defendant to Wing's house and was present when the occurrences above narrated took place, testifying for the defendant, said that when he and defendant reached a point a short distance from the house of Wing, they stopped for a moment and the defendant then "said something about having a little fun with Wing." Frazier also said that Peck, while talking to Wing, was sometimes rather rough in his language and at other times "he was laughing and joking about it"—that is, about the entire transaction, both Frazier and defendant claiming that the money was obtained as a loan and that Wing so understood it. On cross-examination, the district attorney asked Frazier this question: "While you were down at the corral talking to Wing after leaving the house and while Peck was still in the house, did you say anything to Wing, that you thought perhaps that it was a good thing that you came there and that you might have saved his life?" Over an objection by defendant that the question was not pertinent cross-examination, irrelevant, incompetent, and immaterial, and "not said in the presence of the defendant," and, therefore, not binding upon him,

the court permitted an answer to be returned thereto. The witness answered, "Wing said he thought I saved his life and I told him I thought that it was a good thing that I came over there. That is the way I said it." It is now argued that the ruling involved error highly prejudicial to the rights of the accused.

The question was obviously for impeachment purposes and to lay the foundation for counteracting the effect of the testimony of the witness, Frazier, tending to indicate that the defendant had in mind no criminal purpose in going to Wing's house but went there merely to have "some fun" at Wing's expense, and we think that the question was proper cross-examination for that purpose. The general trend of Frazier's testimony was that the whole matter was intended by the defendant as a joke, while the statement which the district attorney undertook to make him admit that he made to Wing after the trouble had ended would show, if he made it, that he regarded the episode as more than a joke—as, indeed, so serious that, in his opinion, but for his presence in the house at the time the defendant might have taken the life of or seriously injured Wing. Of course, the testimony called for by the question could not be used as substantive proof of the defendant's guilt, for manifestly declarations of a party concerning a criminal or unlawful act not made in the presence of one charged with and on trial for the crime cannot be used against or bind the latter. But it frequently happens (and necessarily so when there is occasion for it) that testimony bearing upon the crime and the connection of the defendant with it, which would be incompetent and inadmissible as substantive proof of the crime, is nevertheless allowed under the rule authorizing the impeachment of the testimony of witnesses by thus showing that they had previously made statements contradictory to and inconsistent with their testimony. [6] The proper practice in such a case is for the party against whose interests such impeaching testimony is given to request the court to explain to the jury in its charge that such testimony is to be limited in its effect to the specific purpose for which it is allowed and that the jury are likewise to be restricted in their consideration of it. No

such instruction was given in this case, nor did the defendant propose such an instruction, for which dereliction he appears on this appeal without a legal reason for complaining against a failure of the court so to instruct the jury. [7] It is the duty of a court in criminal cases to give, *sua sponte*, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases, but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. This rule is so well settled that authorities need not be cited herein in support of the statement thereof.

5. The district attorney called to the stand one Meyer, by whom he proposed to contradict or impeach certain portions of the testimony of the witness, Frazier, said Meyer having been present and heard a conversation held on the day succeeding that of the episode in the Wing house, and which was taken down by a stenographer, between Frazier and the district attorney as to what took place at Wing's house between the defendant and Wing. The district attorney's interrogation of Meyer was based upon the written report of such conversation, and, among other questions, Meyer was asked by the prosecutor (reading from the said report) if, in that conversation, Frazier was not asked this question by the district attorney and thereto returned the answer as here given: "Q. Why did George ask for the money? A. I suppose he thought Wing would tell on him and perhaps that would keep him from telling." The court sustained the objection of counsel for the defendant to the question. It is here contended that the question to and the answer of Frazier in said conversation, so brought before the jury, although not confirmed by the witness, Meyer, were prejudicial to the defendant and that the court should have instructed the jury to disregard them. [8] The first answer to this proposition is that counsel should have moved the court to strike out the question and the answer thereto, and have specifically requested the court to instruct or admonish the jury not to consider them in determining the question of the guilt or innocence of the accused, and that his failure to take that course leaves him in no position to complain here. There was no objection that a proper foun-

dation was not laid for the testimony so sought to be brought into the record, and we may, therefore, assume that a proper foundation was laid for it. But the question as put during the course of the conversation did not call for the conclusion of the witness, as is the contention here, but, while the answer then and there given appears to have involved the opinion of the witness as to the reason the defendant asked Wing for the money, it was, in our opinion, perfectly proper to prove at the trial that Frazier extrajudicially made such a statement in reply to the question, not for the purpose of proving a substantive fact against the defendant, but to show that his conception of the nature of the transaction was different at the time of said conversation and less favorable to the accused than as he attempted to make it appear at the trial.

[9] 6. The defendant complains of the following language used by the district attorney in his address to the jury and declares that it was without justification in the record: "I will make the same kind of a complaint against that defendant, or any other citizen of Plumas County, that perpetrates the same kind of a joke, and I will keep on doing it until the treasury of this county is empty." Counsel for the defendant excepted to the foregoing remarks, assigning them as prejudicial to the rights of the defendant, in that they involved "a threat to the jury as to what will take place if they don't convict this defendant."

There was, as we have shown, a statement by the witness, Frazier, that tended to indicate that the defendant's conduct with and toward Wing was intended merely as a joke, and it is perhaps that testimony which furnished the motive for the remarks of the district attorney complained of here. We perceive nothing in the language referred to which is objectionable. It involved a mere ironical reference to a claim which might be predicated upon the inference from Frazier's testimony that the affair at the Wing house was only a joke. And it would require a long stretch of the imagination to see in that language a threat of any character or anything calculated unjustly to influence the jury against the defendant.

We have now considered all the points urged against the result arrived at below, in none of which, as is manifest,

have we found any justification for disturbing either the judgment or the order. Accordingly, the judgment and the order are affirmed.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 2047. Third Appellate District.—October 18, 1919.]

F. C. DREW, Petitioner, v. THE SUPERIOR COURT OF MENDOCINO COUNTY et al., Respondents.

- [1] **PROHIBITION—PURPOSE OF WRIT—JURISDICTION.**—The writ of prohibition goes only to the jurisdiction of the court.
- [2] **ID.—CONTEMPT PROCEEDINGS—JURISDICTION OF SUPERIOR COURTS.**—The superior court has general jurisdiction to initiate and decide contempt proceedings.
- [3] **ID.—REFUSAL TO COMPLY WITH ORDER OF EXAMINATION—REFUSAL OF WRIT.**—A writ of prohibition will not issue out of the appellate court to prevent the superior court from hearing and deciding a contempt proceeding arising out of the failure of the petitioner to obey an order directing him to appear and submit to an examination before a referee in a proceeding supplementary to execution on the theory that the superior court was without jurisdiction, when the matters which the petitioner sets up in excuse for his nonappearance were not presented to the superior court for consideration and decision.
- [4] **ID.—FAILURE TO SEEK RELIEF IN LOWER COURT.**—Where there has been no effort made to obtain relief in the court which it is sought to prohibit, the higher courts will refuse to exercise their jurisdiction by the extraordinary remedy of prohibition.
- [5] **ID.—EXCESS OF JURISDICTION—FAILURE TO CALL TO ATTENTION OF LOWER COURT.**—Prohibition will not go from the appellate court unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction.
- [6] **ID.—ERRORS DURING PROGRESS OF CAUSE—PROHIBITION NOT REMEDY.**—The court in which relief is sought by prohibition will not consider any error or irregularities occurring in the progress of the cause in the inferior court. The writ of prohibition is not an appropriate remedy for the correction of errors.

4. Objection to jurisdiction of inferior court as prerequisite to issuance of prohibition, note, 21 *Ann. Cas.* 167.

6. Prohibition as process for review and correction of errors, notes, 1 *Ann. Cas.* 713; *Ann. Cas.* 1913D, 533.

PROCEEDING in Prohibition to prevent the Superior Court of Mendocino County and J. Q. White, Judge thereof, from hearing a contempt proceeding. Writ discharged.

The facts are stated in the opinion of the court.

Metson, Drew & Mackenzie for Petitioner.

Robert Duncan for Respondents.

ELLISON, P. J., *pro tem.*—Petition for a writ of prohibition, asking that the superior court of Mendocino County be prevented from hearing or deciding a proceeding instituted in said court against said petitioner for an alleged contempt of court.

The record herein shows that on the twenty-eighth day of October, 1918, in an action pending in said superior court, wherein Phil Lobree was plaintiff and L. E. White Company, a corporation, and Goodyear Redwood Company, a corporation, were defendants, the plaintiff recovered a judgment against the defendants for the sum of \$7,150, interest and costs.

On the fourth day of August, 1919, Robert Duncan, attorney for the plaintiff in said action, made and filed and presented to the judge of said court his affidavit, wherein he stated, in substance, the fact of the rendition of said judgment, the issuance of execution thereon and its return wholly unsatisfied; that F. C. Drew was then, and at all times since the beginning of said action had been, the president and general manager of said L. E. White Company; that said company owned property and had it in its possession or under its control, which it unjustly refused to apply to the satisfaction of said judgment, and that said Drew, as president and general manager, had property of said corporation in his possession or under his control, which he unjustly refuses to apply to the satisfaction of said judgment; that the corporation had books of account in the possession or under the control of said F. C. Drew showing properties belonging to said corporation, and particularly of the receipt of money from the sale of its properties to the Goodyear Redwood Company and the amounts and disbursements thereof, and prayed that a referee be

appointed in San Francisco, and that an order be made directing said L. E. White Lumber Company by its president and its general manager and other officers, to appear before said referee at a time and place to be named, and answer concerning the property of said corporation and produce its books showing the property and moneys belonging to it.

Upon the presentation of this affidavit said court made an order appointing Casper A. Ornbaum referee, and directed and ordered said L. E. White Lumber Company, by its president and general manager, F. C. Drew and F. C. Drew, to appear before said Ornbaum at a place designated, on the fourteenth day of August, 1919, at 2 o'clock P. M., and submit to examination and make discovery under oath concerning the property of said corporation, and to bring its books, etc.

The affidavit of Mr. Duncan above referred to was entitled, "*Phil Lobree v. L. E. White Lumber Co. et als.*" The order of the court above referred to was entitled, "*Paul Lobree v. L. E. White Lumber Co. et al.*" To said affidavit and order was attached a certificate of the county clerk of Mendocino County stating: "I have compared the foregoing copy of an order and affidavit in case of *Phil Lobree v. L. E. White Lumber Co. et al.*, and the indorsements thereon with the original records of the same in my office and that same are correct transcripts thereof and of the whole of said original records."

The affidavit, order, and certificate, attached together, were duly served upon F. C. Drew, petitioner herein. On the sixteenth day of August, 1919, Robert Duncan made and filed affidavit in said court in which he set forth the facts stated in his affidavit of August 4th, and the fact of the making of the order by the court therein on that day, of the service of said affidavit, order, and clerk's certificate upon said defendant and said F. C. Drew, and that on the day named in said order neither said defendant corporation nor F. C. Drew appeared before said referee either in person or by attorney.

Upon the filing of this affidavit said court made an order, in due form, directing said L. E. White Lumber Company and said F. C. Drew to appear before said court on August 25, 1919, at 10 o'clock A. M., and show cause, if any they

have, why they and each of them should not be punished for contempt of court in disobeying said order of August 4, 1919, commanding them to appear before said referee. On the twenty-third day of August, 1919, said F. C. Drew applied to this court for a writ prohibiting said superior court from hearing or deciding said contempt matter.

The petitioner claims that the superior court of Mendocino County was without jurisdiction to cite him to appear and show cause why he should not be punished for contempt in disobeying the order directing him to appear and submit to an examination and is without jurisdiction to hear and decide said alleged contempt matter, because (1) The order made by the court for him to so appear and testify was entitled *Paul Lobree* instead of *Phil Lobree*, and there had been no judgment rendered in favor of *Paul Lobree* against the defendant; (2) because, as claimed, the judgment in the case of *Paul Lobree* against the L. E. White Lumber Company was void. It is claimed it was void because before the suit was begun the charter of the defendant corporation had been forfeited for nonpayment of its franchise tax.

[1] The writ of prohibition goes only to the jurisdiction of the court. [2] The court has general jurisdiction to initiate and decide contempt matters. The affidavit filed asking for the order to show cause was sufficient in form and substance to justify the court in making the order. No objection is made to the sufficiency of the order and it was duly served upon the petitioner. The judgment-roll in the original action is before us and an inspection of it shows a judgment valid on the face of the record.

It does not appear that the error in the name of the plaintiff in the order for examination has ever been called to the attention of the superior court of Mendocino County, nor does it appear that the claimed forfeiture of the franchise of the defendant corporation was ever referred to, either by pleading or evidence, in the original action, nor that it, at any time since, has been called to the attention of said court.

The petitioner's position, in fact, is that he has two good defenses to the order to show cause; one, the error in the name of the plaintiff in an order filed heretofore in the

case, and the other that the original judgment is void for matters *dehors* the record.

[3] It is the opinion of the court that the existence of these claimed defenses do not oust the superior court of jurisdiction to hear the contempt proceedings. If they are valid defenses (as to which we deem it unnecessary to express any opinion, and do not) it is to be assumed that the superior court will so hold. Under the facts appearing in this record it is held that these matters should be presented to the superior court for consideration and decision.

[4] "Where there has been no effort made to obtain relief in the court which it is sought to prohibit the superior courts will refuse to exercise their jurisdiction by this extraordinary remedy." (High on Extraordinary Legal Remedies, sec. 733.)

[5] "It has been repeatedly held here, however, that prohibition (a writ in the nature of a prerogative writ) will not go from this court unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction." (*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 475.)

[6] "Nor will the court in which relief is sought consider any error or irregularities occurring in the progress of the cause in the inferior court since the writ of prohibition is not an appropriate remedy for the correction of errors." (High on Extraordinary Legal Remedies, sec. 767b.)

The alternative writ of prohibition is discharged.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 15, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 3016. First Appellate District, Division One.—October 20, 1919.]

J. ELLSWORTH COOMBS, et al., Appellants, v. B. L. REYNOLDS et al., Respondents.

- [1] **WATERS AND WATER RIGHTS—CULTIVATION OF LANDS—INJURY TO LOWER PROPRIETOR—DISCHARGE OF SURFACE WATERS—LIABILITY.** One has a right to utilize the land which he owns, and if an increased flow of water, or of surface water, from his land to a lower piece of land comes from a proper use of his own land, from the cultivation of the same in a proper and useful manner, the lower land owner cannot complain of the increased flow caused by such use and ordinary cultivation or improvement of his land.
- [2] **ID.—RIGHT TO INTENTIONALLY DAMAGE NEIGHBOR.**—While a man has a right to improve and cultivate his land, this does not give the right to intentionally damage his neighbor.
- [3] **ID.—LIABILITY FOR NEGLIGENT CULTIVATION.**—Every owner of land has a right to cultivate it to make use of it for the purposes for which it is best adapted, and, in the course of such use, to plow and cultivate such land, and he is only responsible for injuries falling from such cultivation in the event that such cultivation is performed in a negligent manner.
- [4] **ID.—RULE OF CIVIL LAW.**—While the civil law respecting surface or storm waters, to which the courts of this state are committed, protected a lower proprietor against an upper owner from injuries resulting from sending surface waters down to the lower owner in a manner different from their natural flow, there was one act of man excepted, and that was the tilling of the fields in the natural way.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge. Affirmed.

The facts are stated in the opinion of the court.

Davis, Kemp & Post for Appellants.

H. N. Wells, R. P. Jennings, Frank P. Belcher and J. A. Visel for Respondents.

BARDIN, J., pro tem.—The action was brought to recover damages claimed to have been suffered by the plaintiffs by reason of the alleged diversion by the defendants of certain surface storm waters from the course of their

natural discharge and flow, so that they were concentrated upon the land of the plaintiffs in an unnatural manner and quantity.

In support of this appeal, it is the claim of the appellants that the court committed error in its charge to the jury: (1) In respect to the law as to the liability of an upper proprietor of lands for injuries suffered by a lower proprietor in respect to the discharge of surface storm waters upon the lands of the latter; and (2) in respect to the charge of the court in definition of an act of God as applied to the special defense pleaded by the defendants in bar of recovery.

Counsel for the respective parties are in substantial agreement as to the facts of the case. The defendants Reynolds and Leisure were the upper owners of separate portions of a large tract of land lying eastward from the top of a bluff along the east side of what is known as San Dimas Wash, in the county of Los Angeles, California. The plaintiffs at the same time were the owners of a smaller tract of land of considerably less elevation planted to orange and lemon trees, the easterly boundary of which extended along the top of the bluff referred to and contiguous to the lands of one Bright and of defendant Damerel (as to the latter of whom a motion for nonsuit was granted, of which no complaint is here made), but not contiguous to the lands of Leisure and Reynolds, the land of one Bright intervening.

From the evidence adduced at the trial it appears that the natural drainage of storm waters passing from the lands of Reynolds and Leisure would not ordinarily be discharged upon the lands of the defendants, but would pass through natural depressions easterly from defendant's lands, and eventually pass into fixed watercourses. The surface of defendants' lands is practically in a plane so far as could be readily discovered by the eye, with a gentle slope to the southwest. These lands were also planted to fruit trees and were worked as one tract of land, notwithstanding they were in separate ownership. A short time before the plaintiffs suffered the injuries complained of the defendant Reynolds had been engaged in plowing these lands, the furrows running from east to west. About February 20, 1914, a storm of great and unprecedented violence

visited the locality referred to, attended by an extremely heavy precipitation of rain. The accumulated storm waters gathered in great volume upon the lands of defendants, and in seeking lower levels seem to have followed, to a considerable extent, certain dead furrows caused by the cultivation referred to, so that a large amount of this surface storm water was diverted westerly across the lands of defendants Reynolds and Leisure, thereby contributing to the volume of other storm waters which passed over the lands of Bright and eventually broke over the bluff above plaintiffs' lands, resulting in the injuries complained of.

In response to one of the special issues submitted to the jury, it was found that the conduct of the defendants in the method used by them for the cultivation and improvement of their lands was not negligent. The general verdict was also for the defendants.

The case seems not to have been tried upon the theory that there was a willful diversion or interference with the surface waters referred to, in the sense that any act of the defendants in the cultivation of their soil was done with the object of causing any storm water which might thereafter accumulate to depart from the course of its usual flow, and particularly to be deflected in such a manner as to likely pass in unusual or unnatural manner upon the lands of the plaintiffs. Appellants' fundamental contention finds apt expression in the following quotation from their briefs: "It is true, of course, that the defendants had a right to cultivate and use their land, and also had a right to plow their land, but they must see to it at their peril that the use and cultivation and plowing of the land results in no injury to another."

The respondents' claim, very briefly stated, is that the admitted right of the defendants to till and cultivate their lands is qualified only by the right to exercise such acts of husbandry in a careful and prudent manner.

The learned trial judge in his charge to the jury prepared lengthy and very well-considered instructions covering the question of the liability of an upper owner to a lower owner where injury is suffered by the lower owner by reason of the unnatural flow of surface storm waters brought about without negligence and in the course of usual methods of farming or other agricultural operations, and

unattended by any acts amounting to willful diversion, concentration, or interference with the course of the flow of such waters. These instructions are claimed by the appellants to constitute error and to justify a reversal of the case. We cannot agree with counsel in the behalf claimed.

Among the instructions complained of, but which concisely express the principle which seems to us proper to apply to this controversy, are the following:

[1] "It is also true that one has a right to utilize the land which he owns, and if an increased flow of water, or of surface water, from his land to a lower piece of land comes from a proper use of his own land, from the cultivation of the same in a proper and useful manner, the lower land owner cannot complain of the increased flow caused by such use and ordinary cultivation or improvement of his land. It will be observed that any use of the land which is owned by the defendants herein, which might tend to increase the flow of water upon the land of the plaintiff, the mere fact that it does in some degree increase the flow does not of itself give the plaintiff the right to recover in this case, but you will have then to consider the nature of the improvements, the character of the cultivation, and determine after consideration thereof the question of damage under the general instructions as given you by the court.

"The right to cultivate and improve his land carries with it the right to plow the land, so that the mere fact that the defendants in this case plowed their land would not give any right of recovery to the plaintiff. I shall submit to you, however, in this case, this question, whether or not in such cultivation the defendants were guilty of such negligence, or negligent conduct, that is to say, so negligently improved their land that they caused damage by storm water, which a man of ordinary prudence might have anticipated would have been caused by such conduct. [2] The court instructs you that while a man has a right to improve and cultivate his land, this does not give the right to intentionally damage his neighbor. For illustration in this case, assuming an extreme condition that dead furrows were plowed all over defendants' land and all pointing to the break in question, so that the inevitable effect of such plowing would be to concentrate the water at the point in question; if this sort of course was followed, done with

the express intention or for the express purpose of damage to the plaintiff's land, then he would have a right to recover.

[3] "Returning then to the proposition, the court again states to you that every owner of land has a right to cultivate it to make use of it for the purposes for which it is best adapted, and, in the course of such use, to plow and cultivate such land. Such owner would only be responsible for injuries falling from such cultivation in the event that such cultivation was performed in a negligent manner."

[4] The courts of this state are committed to the rule of the civil law respecting the law of surface or storm waters. (*McDaniel v. Cummings*, 83 Cal. 515, [8 L. R. A. 575, 23 Pac. 795]; *Los Angeles C. Assn. v. Los Angeles*, 103 Cal. 461, [37 Pac. 375]; *Wood v. Moulton*, 146 Cal. 317, [80 Pac. 92].)

While the civil law protected a lower proprietor against an upper owner from injuries resulting from sending surface waters down to the lower owner in a manner different from their natural flow, yet "there was, however, one act of man excepted . . . and that was the tilling of the fields in the natural way." (Kinney on Irrigation and Water Rights, 2d ed., sec. 560; *Martin v. Jett*, 12 La. 501, [32 Am. Dec. 120], and case note.)

In *Livingston v. McDonald*, 21 Iowa, 160, [89 Am. Dec. 563], the court in discussing a question akin to the present one, said: "The very case now before the court was, as it appears to us, met and provided for by the laws of Justinian. The distinction seems to be between injuries occasioned by strictly agricultural operations, and those occasioned by works designed to reclaim or improve the land. In favor of agriculture, injuries by flowing water done to a neighbor, as the result of ordinary farming operations (as with the plow in raising crops), were not actionable. But, if one, with the design and purpose of reclaiming and improving his land, makes ditches upon it and thus, by an increased flow of water, or otherwise, causes an actual injury to the lower owner, he is liable therefor."

That there are exceptions to the general rule that the upper proprietor may not increase or change the burden of

the lower proprietor relative to the duty of receiving surface storm water is recognized, although stated by way of *dictum* in *Board of Trustees etc. v. Rodley*, 38 Cal. App. 563, [177 Pac. 175], where it is said: "The principle does not apply to a gradual increase in drainage that may be caused by the cultivation of the soil according to the usual method."

To fail to approve the instructions complained of upon this particular subject would be to condemn to sterility vast acreages of agricultural lands situate in the state, where storms of violence occasionally attend, and where, because of the varying elevations of neighboring tracts, the run-off of storm water is often torrential in character, causing temporary channels to be rapidly developed in unusual places and manner, and bringing about unexpected washes, and consequent deposits of both water and debris and which the most careful and prudent husbandman could neither anticipate nor make adequate provision for.

Several California cases have been called to our attention which it is claimed establish the inflexible rule that the upper owner is liable in damages for *any* unnatural diversion or concentration of storm waters which result in injury to the lower owner. The cases cited do not meet the situation presented by the record now before us, but relate to or contemplate cases where the injury complained of has been produced by affirmative acts of the party at fault, brought about by a deliberate interference with the natural flow of surface waters, usually by the construction of drainage systems, dams, dikes, ditches, and kindred obstructions and works. The fundamental question involved in this case seems not to have before been directly passed on by any of the appellate courts of this state.

The instructions adverted to were not believed by the trial judge to be hostile to the line of decisions which finds concise expression in the case of *Heier v. Krull*, 160 Cal. 441, [117 Pac. 530], and we share in that belief. Considered with the other harmonious instructions given upon the same subject, they form a lucid exposition of just and equitable principles for the determination of the issues before the lower court.

The views we have expressed upon this subject render it unnecessary to determine whether or not the court erred in

its charge to the jury upon the subject of the special defense that the alleged injury complained of was brought about by the act of God.

The judgment is affirmed.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2907. First Appellate District, Division Two.—October 20, 1919.]

W. J. SIMPSON, Respondent, v. GEORGE H. MALTER, Appellant.

- [1] **APPEAL—REVIEW OF CONFLICTING EVIDENCE.**—The appellate court may not review conflicting evidence on which a given finding is based.
- [2] **FINDINGS—AGREEMENT TO ACCEPT AND PAY FOR WINE—WHAT IMPLIED.**—A finding that the purchaser, which was a company, agreed to accept certain wine and to make payment therefor at a given price per gallon implies a valid and binding agreement by the company to so purchase the wine, made by an agent authorized to act for the company.
- [3] **ID.—APPEAL—FACTS INFERRED TO SUPPORT JUDGMENT.**—Whenever from the facts found by the trial court other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment an appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering its judgment.
- [4] **CORPORATION LAW—LIMITATION OF POWERS OF MANAGER—EFFECT OF PUTTING UNDER DIRECTION OF PRESIDENT.**—A general limitation in the resolution passed by the directors of a company that the powers of the manager should be exercised “under the direction of the president” is not to be construed to mean that the sanction of the president to every detail of every transaction is a condition precedent to the authority of the manager to contract.
- [5] **APPEAL—PRESUMPTION.**—The appellate court will indulge in every presumption with regard to the evidence which will support the findings of the trial court upon which the judgment is based.

APPEAL from a judgment of the Superior Court of Fresno County. D. A. Cashin, Judge. Affirmed.

The facts are stated in the opinion of the court.

Short & Sutherland for Appellant.

Lewis H. Smith and Iener W. Nielsen for Respondent.

LANGDON, P. J.—This is an appeal by the defendant from a judgment in favor of the plaintiff in an action to recover for services in securing a purchaser for certain wines owned by the defendant under an alleged contract with the defendant whereby he was to receive as his remuneration for such services any amount in excess of thirty cents per gallon for which he should sell said wine. With relation to the contract between the plaintiff and the defendant, and its fulfillment, the court found: That the parties had entered into a contract the terms of which were as alleged by the plaintiff, and that thereafter, while said contract was in full force and effect, the plaintiff obtained a purchaser who was ready, able, and willing to purchase sixty thousand gallons of wine at a price of thirty-five cents per gallon and upon the terms contained in the contract between the plaintiff and defendant, and said plaintiff immediately notified said defendant thereof and of the name of said purchaser and brought said defendant and said purchaser together at the city of Fresno, and that the defendant thereupon agreed to make said sale and deliver said wine on said terms to said purchaser; that said purchaser agreed to accept said wine and to pay for the same in cash, but that said defendant, thereafter, and without any cause or reason, and without any fault on the part of the plaintiff, or upon the part of the purchaser, declined to consummate the sale and declined to make delivery.

[1] In accordance with the rule recognized by the appellant, we may not review the conflicting evidence on the question of the making of the contract, its terms, etc.; nor the finding that the defendant agreed with the purchaser for the sale of his wine in accordance with the terms of this contract made by said defendant with the plaintiff. For the same reason we may not review the evidence upon which is based the further finding of the court that the time which elapsed between the making of the agreement and the performance of the same by the plaintiff was not an unreason-

able time. The last finding is based upon logical deductions from numerous matters which appear in evidence, such as the conduct of the parties during the interval, the apparent understanding of the parties as evidenced by the negotiations when the purchaser was produced, etc. After a reading of the evidence, we think this finding also may not be disturbed by us.

This leaves for our consideration the further objection made by the appellant that the plaintiff is not entitled to recover because Mr. Baker, purporting to act for the Jesse Moore Hunt Company, the purchaser, was without authority to consummate the sale in accordance with the terms of the contract between the plaintiff and the defendant, and that the defendant could not have enforced said agreement against the said Jesse Moore Hunt Company, for whom Baker was acting if he had so desired, and, therefore, he was not liable to the plaintiff for commissions. This contention arises under the following facts in evidence: It is conceded that Mr. Baker was the general manager of the Jesse Moore Hunt Company. He testified that he had bought and sold large quantities of wine for said company while acting as its manager. Appellant relies upon an alleged limitation upon the said manager's general authority to contract, by reason of the adoption of a resolution by the board of directors of said company, which resolution was in effect at the time of the transactions out of which this action grew. This resolution appointed Mr. Baker "manager of the company, to have charge of the handling of the business under the direction of the president." Mr. Baker testified that the plaintiff Simpson was present at a conversation between Baker and the president of said company, at which time it was stated that Mr. Simpson had offered to sell to said company sixty thousand gallons of wine at thirty-five cents per gallon, less four per cent for cash, and that the president of said company had told Baker that it was all right and he might go ahead and make the purchase and might go to Fresno to complete the transaction. Baker testified that he went to Fresno and was met by the plaintiff, who told him at that time that he was uncertain about the allowance of four per cent discount for cash; that Baker thereafter discussed the matter with the defendant, telling said defendant that the wine had been

sold to him by Simpson at thirty-five cents per gallon, less four per cent, but that Malter, the defendant, refused to allow the discount. Baker then stated to Malter that, nevertheless, he would take the wine at thirty-five cents per gallon and would pay cash for it if desired. Appellant argues that by virtue of the resolution of the board of directors above referred to, the president of the company had the authority to direct the business activities of the manager in all particulars; that the president's consent to the purchase was based upon his understanding of the contract as one to purchase at thirty-five cents per gallon, less four per cent; that his consent was given on such terms alone, and that Baker had no broader authority. Appellant argues that if the Jesse Moore Hunt Company had elected to repudiate the contract sought to be made by Baker, the defendant would have been unable to enforce the same, because Baker's authority was limited and was not sufficient to make the contract attempted to be made. And it is pointed out that such limitation upon Baker's authority was known to Simpson who was present during the conversation with the president, and Simpson acted as the agent of Malter and his knowledge was the knowledge of his principal.

If the manager's authority was so limited that it was necessary for him to have express authority from the president in each instance before making a purchase of wine, the question of how little or how much he might vary from his instructions without releasing his company would become pertinent. But we think no such question confronts us here, because there is an implied finding of the trial court that there was no such limitation upon the authority of the agent as the appellant maintains. [2] The court has found that the said purchaser agreed to and with said defendant to accept the wine and make payment therefor to the defendant at thirty-five cents per gallon in cash. The purchaser who agreed to this was the company. It is not contended that Baker acted or purported to act in his individual capacity. To find that the purchaser agreed to accept the wine and to make payment therefor implies a valid and binding agreement. If it was a binding and valid agreement by the company to so purchase the wine,

it could only be such by reason of the fact that the agent was authorized to contract for the company as he did contract. [3] Whenever from the facts found by the trial court other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment an appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering its judgment. (*Breeze v. Brooks*, 97 Cal. 77, [22 L. R. A. 257, 31 Pac. 742].) Such inferential finding of the trial court that the agent's authority was sufficient to enter into a valid and binding contract on behalf of the company, we believe, is warranted by the evidence. As stated, the manager testified that he had previously bought and sold large quantities of wine for his company; such power would be within the usual powers of a manager of a company engaged in the business of the Jesse Moore Hunt Company. [4] The general limitation in the resolution of the directors that the powers of the manager should be exercised "under the direction of the president" is not to be construed to mean that the sanction of the president to every detail of every transaction is a condition precedent to the authority of the manager to contract. (*Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 252, [123 Pac. 212]; *Medbury v. New York & Erie R. R. Co.*, 26 Barb. (N. Y.) 564, 567; *Cotton States Life Ins. Co. v. Mallard*, 57 Ga. 65.) Furthermore, it appears from the evidence that the president did authorize Mr. Baker to make this particular purchase, and there is nothing in the record to show that he restricted the price at which the purchase was to be made. The price appears from the evidence to have been a reasonable price and, indeed, an advantageous one to the company.

[5] Upon appeal, we cannot but indulge in every presumption with regard to the evidence which will support the findings of the trial court upon which the judgment is based. (*Breeze v. Brooks*, 97 Cal. 72, [22 L. R. A. 257, 31 Pac. 742]; *Pacific States Corp. v. Arnold*, 23 Cal. App. 672, [139 Pac. 239].) In the present case that course leads us to affirm the judgment.

Nourse, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 18, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2040. Third Appellate District.—October 20, 1919.]

W. F. BURNS, Appellant, v. SOUTHERN PACIFIC COMPANY (a Corporation), et al., Respondents.

- [1] **NEGLIGENCE—ACTION FOR DAMAGES—AUTOMOBILE COLLISION—LIABILITY OF OWNER—CONTROL OF TRUCK BY THIRD PARTY.**—In this action by a father for damages for the death of his son, who was killed in a collision between a truck on which he was riding and a gasoline motor car operated on a railroad track, the court properly granted a nonsuit as to the owner of such truck, both the truck and the chauffeur at the time of the collision having been under the exclusive control and management of another to whom the truck had been hired.
- [2] **ID.—EXCLUSIVE CONTROL BY CHAUFFEUR—LIABILITY OF FELLOW-EMPLOYEE.**—Where such chauffeur had exclusive control and management of the truck at the time of the collision and was acting upon his own initiative with full power to manage the same as to him might seem wise or expedient as the driver of a gasoline engine, the court properly granted a nonsuit as to a fellow-employee who was only accompanying the truck as a passenger, neither exercising control nor giving any direction as to its movements.
- [3] **ID.—EMPLOYER ENGAGED IN FARMING AND FRUIT-RAISING—WORKMEN'S COMPENSATION ACT OF 1913 NOT APPLICABLE.**—A cause of action against an employer engaged in farming and fruit-raising for the death of an employee through the negligence of a fellow-employee is specially exempted from the Workmen's Compensation Act of 1913 and the subsequent amendments thereto.

1. Liability of owner when car is being used by borrower or hirer, note, 33 L. R. A. (N. S.) 81.

3. Application of Workmen's Compensation Act to employees engaged in farming, note, 7 A. L. R. 1296.

- [4] **ID.—ROSEBERRY ACT NOT REPEALED.**—The provisions of the Roseberry Act, so far as they relate to compensation for injuries occurring to persons engaged in farm, dairy, agricultural, viticultural or horticultural labor, were not repealed by the Workmen's Compensation Act of 1913.

APPEAL from a judgment of the Superior Court of Sutter County. John F. Ellison, Judge Presiding. Reversed in part; affirmed in part.

The facts are stated in the opinion of the court.

L. T. Hatfield, Martin I. Welsh and W. H. Hatfield for Appellant.

A. H. Hewitt and W. H. Carlin for Respondents.

PLUMMER, P. J., pro tem.—On and prior to the twenty-seventh day of June, 1917, Emmans Franklin Burns, a son of the plaintiff, was in the employ of the defendant Jackson, picking fruit on his ranch in Sutter County. Defendant McRoberts was acting as superintendent for defendant Jackson in the management of the farm and orchard on which plaintiff's son was working. The defendant Prinderville was a chauffeur engaged in the driving of a truck belonging to the defendant Diggs, and was in the general employ of said defendant, but at the time in question both chauffeur and truck had been hired by defendant Diggs to defendant Jackson, and were under the exclusive control and direction of the latter.

In the afternoon of the day above mentioned, the defendant Prinderville was directed to take a load of apricots to a station named Oswald, on the line of the Southern Pacific railway, and Emmans Burns, a son of the plaintiff, as aforesaid, was directed to accompany the defendant Prinderville and assist in unloading the apricots and in loading empty boxes on the truck, to be brought back on the return trip. The defendant McRoberts accompanied the truck to Oswald station, but does not appear to have had or exercised any control or direction over the chauffeur, defendant Prinderville. The trip to Oswald station was made safely, the apricots unloaded, and the truck reloaded with empty fruit-boxes and started back toward the orchard. On the return trip the defendant Prinderville had charge of the

truck as its driver, the defendant McRoberts sat upon the same seat and to the right of the chauffeur, and Emmans Burns occupied a position on top of the boxes about three feet above the seat where the other two persons were sitting. In what direction Emmans Burns was facing, the evidence does not disclose. As the truck was proceeding in an easterly direction, and at a time when it was crossing the railroad tracks belonging to defendant Southern Pacific Company, a collision occurred between the truck and a gasoline motor car then being operated on the tracks of the defendant company. In this collision Emmans Franklin Burns was killed, and the plaintiff prosecutes this action against all of the defendants above named to recover for the loss of his son so incurred.

At the conclusion of the plaintiff's testimony the court granted a nonsuit as to the defendants Jackson, Diggs, and McRoberts. As to the other defendants, the cause proceeded to verdict and judgment, and plaintiff prevailed as against the defendant Prinderville.

From the judgment of the trial court granting a nonsuit as to the defendants Jackson, Diggs, and McRoberts, the plaintiff urges this appeal.

[1] The fact that Diggs was the owner of the truck, and that the defendant Prinderville was in his general employ as a chauffeur, appears to be the only cause for having joined him in this action, but, as the testimony shows without contradiction that at the time of the collision referred to both truck and chauffeur were under the control and management of the defendant Jackson, the correctness of the ruling of the court as to the defendant Diggs requires no further mention.

[2] It also appears from the testimony that the chauffeur had exclusive control and management of the truck at the time of the collision, was acting upon his own initiative, with full power to manage the same as to him might seem wise or expedient as the driver of a gasoline engine, and that McRoberts was only accompanying the truck as a passenger, neither exercising control nor giving any direction as to its movements. The correctness of the ruling of the court, in so far as it relates to the defendant McRoberts, would appear to be fully established.

While several questions have been discussed in the briefs submitted by counsel, the correctness of the ruling of the court as to the defendant Jackson depends upon one question, to wit: Has or has not the act of the legislature approved April 8, 1911, commonly known as the Roseberry Act, been repealed in so far as it relates to the cause of action set forth in plaintiff's complaint?

The judgment of nonsuit in favor of the defendant Jackson was entered on the theory that section 1970 of the Civil Code applies to and exclusively controls the determination of the issues tendered in this cause, and that the Roseberry Act has been entirely repealed. Two cases decided by this court are cited as authority, as follows: *Brown v. Lemon Cove Ditch Co.*, 36 Cal. App. 94, [171 Pac. 705], and *Reynolds v. E. Clemens Horst Co.*, 35 Cal. App. 711, [170 Pac. 1082].

In deciding the Brown case, the court apparently sustains the contention of respondents, in using the following language: The contention of appellant is that it ignores the doctrine of comparative negligence, as provided in what is known as the Roseberry Act of 1911; but that law was repealed by the Workmen's Compensation Act of 1913, page 279, and the accident herein occurred after the latter statute became operative.

In that action, as further appears, the plaintiff relied upon the gross negligence of the defendant. Upon this issue the verdict of the jury was against him, and the judgment was upheld on appeal.

An examination of the facts of that case will show that the language of the court in its application thereto, and in its holding that the Roseberry Act was repealed, was correct in so far as it applied to the issues then being determined.

In the Reynolds case, *supra*, the court does not hold that the Roseberry Act is repealed, it being merely stated that "the point is made that the Roseberry Act and section 1970 of the Civil Code were repealed by the Workmen's Compensation Act of 1913, which went into effect before the commencement of this action. There is no question, though, that the accident happened before said act of 1913 became operative, and without following the argument of appellant in detail, we deem it apparent that section 91 of the act—'the compensation provisions of this act shall not apply

to any injury sustained prior to the taking effect thereof'—constitutes a saving clause and continued in force, as far as this case is concerned, the said Roseberry law and said section of the code."

The facts of the Brown case and of the case now at bar are clearly distinguishable. One falls within, the other is excluded from, the act of 1913. Here, the question is the applicability of specification number 2 of section 1 of the Roseberry Act, which reads: "It shall not be a defense that the injury or death was caused, in whole or in part, by the want of ordinary or reasonable care of a fellow-servant." The actual repeal or nonrepeal of the Roseberry Act, or any part thereof, was not really involved in the decision of the Brown case. The saving clause, found in section 91, and upon which the decision was based, eliminated such question.

[3] The cause at bar is one specially exempted from the Compensation Act approved May 29, 1913, and the subsequent amendments thereto.

[4] It must be borne in mind that the act of April 8, 1911, provided two methods for making compensation for injuries occurring to employees. One set forth in section 1 of the act; a second under the subsequent provisions thereof, which became the foundation of and since incorporated into the Workmen's Compensation Act. Section 12 of this act sets forth the circumstances and conditions under which it is applicable and to which its terms apply. Then, in subdivision (c) of the same section, it is specifically provided that "in all other cases where the conditions of compensation do not concur, the liability of the employer shall be the same as if this act had not been passed." Following this, section 14 expressly excludes all persons engaged in farm, dairy, agricultural, viticultural, or horticultural labor, etc. After setting forth the manner and procedure for applying the provisions of said Compensation Act, section 90 is inserted, which reads as follows: "All acts or parts of acts inconsistent with this act are hereby repealed." There is no mistaking the language of this section. It relates only to acts, and parts of acts, inconsistent with the provisions of the workmen's compensation law, and extends no further. It does not repeal, modify, or change any act, or part of act, of the legislature which is outside of and excluded from

the terms and provisions of the workmen's compensation law.

By direct language the parties in the cause at bar, and all the law relating to them, are excluded from the act of May 26, 1913. The amendment to section 14, by act approved May 27, 1915, does not change the law in so far as it relates to farmers, horticulturists, etc.

In the case of *Hackleberry v. Sherlock Land & Cattle Co.*, 39 Cal. App. 764, [180 Pac. 37], this court draws the distinction which is here being made, and held that the Employers' Liability Act of 1911 was not repealed by the act of 1913, save and except in so far as an inconsistency existed between the two acts; and further held that the act of 1911 was in full force and effect in so far as the Hackleberry case was concerned. In that case, as in this case, the conditions of compensation referred to in the act of 1913 and the amendatory act of 1915 (page 1079) do not concur or affect the plaintiff or any of the defendants. Hence it follows that the liability shall be the same as if the act of 1913 had not been passed. This court also there held that the Roseberry Act lays down rules of substantive law governing the classes of employees excluded by the express terms of the Employers' Liability Act of 1913.

From what appears from the foregoing examination of the Roseberry Act and the act of 1913, we conclude that the former has not been repealed in its provisions so far as they relate to the cause at bar. Without setting forth the evidence in detail, it is only necessary to say there was sufficient evidence to take the case to the jury as to the defendant Prinderville being an employee of the defendant Jackson, and also as to the negligence of the defendant Prinderville in his operation and management of the auto-truck at the time of the collision.

For the reasons herein given, the judgment of nonsuit in favor of the defendants Diggs and McRoberts is hereby affirmed, and the judgment of nonsuit in favor of the defendant Jackson reversed, and the cause remanded for a new trial as to the defendant Jackson.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 18, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2020. Third Appellate District.—October 20, 1919.]

H. YOSHIZUMI, Respondent, v. PLATT PRODUCE COMPANY, Appellant.

- [1] **SALES—DELIVERY F. O. B. BOAT—ACTION FOR BREACH OF CONTRACT—EVIDENCE OF CUSTOM AND USAGE.**—Where the contract for the sale and purchase of certain potatoes provides that said product is to be delivered f. o. b. boat, at a designated landing, but is silent concerning who is to provide the boat, in an action for breach of contract on the part of the purchaser, evidence of custom and usage is admissible to determine upon whom the burden is imposed of providing a boat upon which the produce can be loaded and to prove that f. o. b. means on the wharf ready for the boat.
- [2] **ID.—ORDERS BY THIRD PARTIES TO BARGE CAPTAIN—HEARSAY.**—In such action, orders given by a third party to the captain of a certain barge which had called at the landing on which plaintiff had delivered the potatoes were not competent to prove either what he said or did at the landing.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge. Affirmed.

The facts are stated in the opinion of the court.

Snyder & Snyder for Appellant.

Shelton & Levy for Respondent.

ELLISON, P. J., pro tem.—The complaint alleges that on August 11, 1917, plaintiff and defendant entered into a contract in writing whereby plaintiff agreed to sell and defendant agreed to buy 540 sacks of potatoes, at the agreed price of three dollars per sack, of 116 pounds each, and

that said product should be delivered, starting at the last of the ensuing week, f. o. b., boat, at McDowell Camp, No. 23½, San Joaquin County.

It was further agreed that delivery of said product on board of boat would constitute full and complete acceptance thereof; that plaintiff duly performed all the conditions of said contract and started to deliver said product on the last of the ensuing week, and on August 27, 1917, 540 sacks of said product were on the river bank at said camp, ready for inspection and transportation by the defendant by means of water craft; that it is the definite, well-known, and uniform custom and usage of the purchasers of potatoes in the vicinity of Stockton and on points located on the San Joaquin River and its tributaries to inspect the product while on the bank, and to send water craft to such point to take delivery thereof; that plaintiff notified defendant on August 27, 1917, that said product was on the bank and defendant thereupon, and again on August 31, 1917, assured plaintiff it would send a barge to obtain delivery thereof; that defendant failed to do so prior to September 3, 1917, and on that day plaintiff demanded that defendant take delivery of said produce, and notified defendant that in default thereof plaintiff would sell the same to defendant's account to the best advantage; that on September 3, 1917, a barge belonging to one R. H. Vehmeyer called at said camp, and the agent thereof took possession of said product, loaded it on said barge, and transported it to a warehouse at Stockton; that said Vehmeyer thereupon notified defendant thereof and defendant instructed him not to enter said product in said warehouse in its name; that thereupon plaintiff sold said product for \$1.90 per sack, or for the sum of \$1,026, to his damage in the sum of \$594, for which amount he prayed judgment.

The court found that plaintiff had performed all of the conditions of said contract on his part to be performed and started to deliver said product at the last of the ensuing week, as therein provided, and on August 22, 1917, said 540 sacks of potatoes were on the river bank at said camp, ready for transportation by the defendant.

The court also found that, "It is the definite, well-known, and uniform custom and usage of the purchasers of potatoes in the vicinity of Stockton and on points on the San

Joaquin River and its tributaries to send water craft to points on said river bank to take delivery of such product," and, "in previous transactions with plaintiff, defendant had sent such means of transportation and in respect of the transaction here in controversy made an effort to procure the same." Judgment was rendered for the plaintiff for the amount stated in the prayer of the complaint. The defendant appeals.

Over the objection of the defendant, evidence was introduced to support the allegations as to the custom and usage in the matter of getting boats to move produce, and it is appellant's contention that such evidence was inadmissible and that it tended to vary the terms of a written contract, one in nowise uncertain.

[1] The decisions seem to be quite uniform to the effect that proof of custom and usage is admissible to determine upon whom, in a case like this, the burden was imposed of providing a boat upon which the produce could be loaded and admissible to prove that f. o. b. means on the wharf ready for the boat.

It is to be observed that the contract is silent concerning who was to provide the boat. In this particular it is uncertain and indefinite. In *Meyer v. Sullivan*, 40 Cal. App. 723, [181 Pac. 847], it is said: "In order to determine whether or not delivery was to be made on the deck of the Kosmos steamer, as contended for by defendants, or merely on the Arlington dock, in Seattle, as claimed by plaintiffs, the trial court admitted evidence of the nature of the transaction, and the usages and custom of the trade in such matters. Appellants vigorously attacked the findings and conclusions of the court, and particularly its action in admitting testimony in proof of the custom of the trade.

"We are satisfied of the correctness of the trial court's findings in these matters. The fact that the parties to this action have come to such a vigorous disagreement over the meaning of the terms of the contracts is some indication that the court might be compelled to look to other sources of information than the contracts themselves in order to arrive at a proper interpretation of the disputed point. That the evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the

f. o. b. clauses of the contracts is borne out by the authorities. (*Cowas-Jee v. Thompson*, 5 Moore P. C. 165, [13 Eng. Reprint, 454]; *Stock v. Inglis*, 5 Asp. M. C. 294; *George v. Glass*, 14 U. C. Q. B. 514; *Marshall v. Jamieson*, 42 U. C. Q. B. 115.)

"The admitted evidence fully supports the court's finding that it was and is a general custom, among buyers, sellers, and shippers of wheat in the city of Seattle, and in the city of San Francisco, and, generally, in Pacific Coast ports, 'under contracts for the sale of wheat f. o. b. steamer, or f. o. b. designated steamer for the seller to deliver and for the buyer to receive and accept the wheat upon the dock alongside of ship's tackle,' " (40 Cal. App. 723, [181 Pac. 847].)

In *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 397, [45 N. E. 126] the court said: "The fact that appellees were required by the contract to deliver the coal free on board of the cars at the mine can have no bearing on the question in regard to whose duty it was to furnish cars. The furnishing cars at the mine, to be filled with coal, was an independent matter, in no manner connected with the duty of filling the cars. When the cars were furnished, then it devolved on appellees to fill them free of any expense to appellant; but, until the cars were furnished, they were required to do nothing, except to have the coal ready. It being the duty of appellant to furnish the cars, under the contract, its failure to discharge this duty was a clear breach of the contract, for which appellees, who were ready and willing to furnish the coal, were entitled to recover."

See, also, *Evanston etc. Co. v. Castner* (C. C.), 133 Fed. 409.

There was no error in admitting this testimony.

[2] The plaintiff testified that barge No. 11 was at Camp McDowell after the potatoes had been placed on the landing; that he asked the captain to take them on the barge, and he refused, saying he had no orders to do so. The captain, in rebuttal, testified he did not remember whether he made the statement or not. He was then asked if he did not have orders on each trip to bring in all potatoes for the Platt Produce Company that were ready to be loaded. An objection to this and similar questions was sustained and the ruling is assigned as error. When the

witness Lenning was testifying, the defendant, as part of the examination, offered in evidence the order made by the transportation company and given by it to Mr. Lenning, the captain of the barge, directing him where to go on the trip and what products to load. An objection to the evidence was sustained, the court remarking that the witness could use the order that he took with him to refresh his memory. This ruling of the court is assigned as error. The witness, following the remark of the court, stated: "Here is my log-book; just exactly what I did at the landing." The defendant, instead of acting upon the suggestion of the court that the witness might use the order he had with him to refresh his memory and instead of taking advantage of the statement of the witness that his log-book showed exactly what he did, and asking him what he did at the landing, reverted to his original question of what his orders were. The court correctly ruled that his orders from a third party were not competent to prove either what he said or did at the landing. For the purpose for which the orders were offered they were neither relevant nor competent. (*People v. Mitchell*, 94 Cal. 550, [29 Pac. 1106]; *Butler v. Estrella Raisin Co.*, 124 Cal. 239, [56 Pac. 1040].)

We find no error in the record and the judgment is affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 2018. Third Appellate District.—October 20, 1919.]

BEN HAYASHI, Respondent, v. PACIFIC FRUIT EXCHANGE (a Corporation), Appellant.

- [1] CHATTEL MORTGAGES—HARVESTING OF CROPS BY MORTGAGEE—PURPOSE OF PROVISIONS—CONSTRUCTION.—In this action to compel the satisfaction and discharge of record of a certain crop mortgage given to secure a money loan, the provisions in the mortgage that the mortgagee should have the right to market the crops and receive therefor the prevailing rates or commissions, and that the mortgagor should purchase from the mortgagee the supplies needed in preparing the crops for market, were incorporated therein for

the purpose of protecting the security for the payment of the money borrowed by the mortgagor from the mortgagee, and not to secure to the mortgagee the right to the possession of and to market the fruit when harvested or the right to furnish supplies to the mortgagee.

- [2] **ID.—SECURITY FOR FUTURE ADVANCES.**—A mortgage may be given to secure future advances, the amount of which may not be ascertainable until proceedings in foreclosure are ripe, or to secure indorsements made and to be made, or to secure payment for merchandise, not exceeding a specified amount, to be delivered at different intervals of time in the future.
- [3] **ID.—SECURITY FOR UNLIQUIDATED DEBTS.**—A mortgage may be given to secure the payment of a debt which, while not actually existing when the contract of hypothecation is made, is, from the nature of the contract and the whole subject matter thereof, inherently capable of coming into existence.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Dunn & Brand for Appellant.

Charles A. Bliss for Respondent.

HART, J.—Plaintiff brought the action to compel defendant to satisfy and discharge of record a certain crop mortgage given by plaintiff to secure the payment of a loan of two hundred dollars made to him by the defendant and for one hundred dollars damages as provided in section 2941 of the Civil Code. Judgment was in favor of plaintiff as prayed, from which judgment defendant prosecutes this appeal.

The principal question to be determined is as to what construction should be given the crop mortgage, plaintiff's claim being that it was given merely as security for the repayment of the two hundred dollars borrowed by him from defendant, while the contention of the defendant is that the mortgage was given to secure the performance of the marketing provisions of the mortgage, as well as the payment of the note.

2. Mortgage to secure future debts, notes, 116 Am. St. Rep. 690; 1 A. L. R. 1586.

Plaintiff was in the possession of 120 acres of land near Florin, in Sacramento County. On the sixteenth day of October, 1918, he borrowed from the defendant the sum of two hundred dollars and executed the crop mortgage in question. The instrument contained the following provisions, among others: That the mortgagor, for and in consideration of the sum of two hundred dollars to him in hand paid, "does sell and convey unto the said party of the second part [defendant] . . . the following growing crops, viz.: The crop of grapes of every description, now growing and to be grown during the seasons of 1919-20-21 upon the trees and vines now being, standing and growing and to be grown, and also all other agricultural and horticultural products," etc., upon the lands described; ". . . provided, nevertheless, and these presents are upon the express condition that if the said party of the first part . . . shall well and truly pay" said promissory note, "and also all other indebtedness that may hereafter be due, owing or existing from said" mortgagor ". . . and well and truly perform all other covenants herein provided to be performed by the party of the first part . . . then these presents shall be null and void. Also in consideration of the sum hereinbefore mentioned, the party of the first part hereby places his entire crops of grapes" for said seasons "in the hands of the party of the second part, to market for his account. The party of the second part to receive for its services in marketing said crops, its usual rates of commission established by it in the district. The party of the first part shall also pay to the party of the second part a loading charge of three cents per package. The party of the first part shall purchase from the party of the second part the necessary shock, paper, nails and other supplies needed in preparing the above mentioned crops for market." The mortgagor agreed to protect said crops while growing and to "prepare the same for market and deliver the same immediately into the possession of said party of the second part."

The court, on motion of the plaintiff, struck from the answer certain allegations, setting forth facts in support of defendant's theory of the scope of the mortgage herein involved. Notwithstanding the granting of this motion, the defendant at the trial offered to prove the allegations

stricken out, but, on objection of plaintiff, such proof was excluded.

The action was tried before the court sitting without a jury. The court found: "That defendant has never advanced, paid out or expended for or on plaintiff's account, any sum" other than the two hundred dollars evidenced by said promissory note; "that on the eleventh day of January, 1919, plaintiff repaid to defendant said sum of two hundred dollars, together with the interest due thereon to said date, and said defendant thereupon canceled said promissory note," and that plaintiff demanded satisfaction of said mortgage, which was refused; that the provisions of the mortgage that defendant should market the crops and receive commission, that plaintiff should purchase supplies from defendant, etc., were included in said mortgage "for the purpose of protecting and preserving the security . . . given to secure said promissory note, and for no other purpose," that since the making of the note and mortgage no crops of any kind have been harvested by plaintiff or marketed by defendant for plaintiff, and plaintiff has not bought any supplies from defendant.

Section 2941 of the Civil Code provides that when any mortgage has been satisfied, if the mortgagee does not cause the same to be satisfied of record, he shall be liable to the mortgagor for damages, "and shall also forfeit to him or them the sum of one hundred dollars."

The instrument, while upon its face a defeasible or conditional sale of the grape crop, is in legal effect a chattel or crop mortgage, and bears a close resemblance to a deed of trust, whereby the legal title to realty is conveyed to trustees to secure money loaned to the trustor by the *cestui que trust*, such title being defeasible by payment of the money loaned. The instrument provides, however, that the mortgagee shall be entitled to the immediate possession of the grapes when they are harvested and thus are in tangible and removable form, and this, it may be added, is also additional security for the payment of the note. But there is no question here raised as to the legal nature of the instrument. It designates itself as a mortgage, makes provision for certain matters in case of the foreclosure, and the parties treat it in their presentation of the points on this appeal as a mortgage.

[1] We agree with the conclusion arrived at by the trial court, in the construction of the writing, that the provisions in the mortgage that defendant should have the right to market the crops and receive therefor the prevailing rates or commissions for that service and that plaintiff should purchase the mentioned supplies from defendant, etc., were incorporated into the instrument for the purpose of protecting and preserving the security for the payment of the note. It is probable also that said provisions contemplated another purpose, to wit: To give to the defendant the profits accruing from its services in the marketing of the fruit and from furnishing to the plaintiff the supplies required in the proper preparation of the fruit, when harvested, for marketing.

It will be noted that the language or sentence introducing the provisions referred to into the instrument commences with the word "also," and that the provision requiring the plaintiff to place "his entire crop of grapes" for the three seasons named in the hands of the defendant "to market for his account" expressly states that it shall constitute a part of the consideration for the loan of the money evidenced by the note to secure which the mortgage was given. The salient part of the language or sentence is: "*Also, in consideration of the sum hereinbefore mentioned, the party of the first part hereby places his entire crop of grapes for the seasons of 1919-20-21 . . . in the hands of the second party to market for his account.*" It will be observed that it is not by language expressly provided, nor is it reasonably susceptible to that construction when it is considered in connection with the other provisions of the instrument, that "the mortgage is intended to secure and does secure the right of the defendant to the possession of the fruit when harvested." It merely says and plainly means that by it the defendant, as part of the consideration for the loan of the money, and also as further security for its repayment, shall be entitled to the possession of the fruit for the years named and to market the same for and on account of the plaintiff. The same is true as to the provision whereby the plaintiff agreed to purchase the supplies necessary for preparing the grapes for shipment or marketing from the defendant—that is, the same is true

of that provision in so far as the matter of the consideration for the note was concerned.

The result of the foregoing views is that the mortgage was intended to secure the payment of the note and not to secure to the defendant the right to the possession of and to market the fruit when harvested or the right to furnish supplies to the plaintiff. These latter rights, as stated, were intended only as additional consideration for the note and as security, other than the mere mortgage itself, for the payment of the note. The plaintiff testified that, when negotiating for the loan and before he obtained it, he was told by defendant's agents that he would have to sign a marketing contract to market the crops for three years. The transaction was then reduced to writing, which writing embraced not only the mortgage to secure the payment of the note, but a shipping contract to which, as we conclude, the mortgage has no more relation than if the two agreements were in separate or different writings.

It may further be observed that the provisions of the mortgage could not be held to operate as a lien to secure the performance by the plaintiff of the agreement to place the grapes with defendant for marketing and to purchase supplies from the latter in any event unless, in case of default by plaintiff to perform these agreements, the defendant suffered some detriment or damage. In other words, it would hardly be in consonance with the principles of justice, or, indeed, with common sense, to hold that, although the defendant suffered no injury or loss from the default of the plaintiff in complying with the agreements referred to, it could, nevertheless, upon such default by plaintiff, proceed to foreclose the mortgage and cause the plaintiff's grape crops to be sold under the decree of foreclosure, for what purpose? If, however, the defendant should suffer loss or damage by the failure of the plaintiff to place the grapes with it to market or by his default in complying with his agreement to purchase supplies from the defendant, then it would have to be ascertained what that loss or damage was, and, if any be found, what damages, measured in money, would compensate the defendant for the loss so suffered by it. We have never heard of a mortgage being given to secure the payment of damages for the breach of a contract and we do not think that any such

a mortgage is to be found referred to in the books. Ordinarily, the security taken to insure the performance of such agreements as we are now considering is in the nature of a bond, and the remedy available to the party for whose benefit the bond is given, in case of a breach of the contract, is legal and not equitable, as is true in the case of the foreclosure of a lien.

[2] It is very true, as counsel for the defendant point out, a mortgage may be given to secure future advances, the amount of which may not be ascertainable until proceedings in foreclosure are ripe (*Tapia v. De Martini et al.*, 77 Cal. 383, [11 Am. St. Rep. 288, 19 Pac. 641]); or to secure indorsements made and to be made (*Brander v. Bowmar et al.*, 16 La. 370; *Kramer v. Trustees of F. & M. Bank*, 15 Ohio, 253); or to secure payment for merchandise, not exceeding a specified amount, to be delivered at different intervals of time in the future. (*Marvin, Assignee in Bankruptcy, etc., v. Chambers*, 12 Blatchf. 495, [Fed. Cas. No. 9179].)

In *Stoughton v. Pasco*, 5 Conn. 442, [13 Am. Dec. 72], cited in 1 Jones on Mortgages, sixth edition, as authority for the statement therein "that a mortgage to secure the fidelity of an agent or factor is good," it is held, using the language of the syllabus: "Where one of two joint trustees of the property of a deceased person for the benefit of legatees executed a mortgage to the other to render a true account and pay over and deliver to the mortgagee all moneys, notes, and securities of the estate in the mortgagor's hands, such mortgage was held a valid encumbrance to the amount due, which was found to be \$3,137 as against a subsequent mortgage with actual notice of an adjustment between the mortgagor and first mortgagee, and that there was more than two thousand eight hundred dollars due."

[3] But it is manifest that the case here does not come within the principles of the above cases. There never has been any doubt that a mortgage given to secure an unliquidated debt may be upheld. An "unliquidated debt," however, within the meaning of that expression as it is used in the sense that its payment is capable of being secured by a mortgage, is a debt which, while not actually existing when the contract of hypothecation is made, is, from the

nature of the contract and the whole subject matter thereof, inherently capable of coming into existence. It simply means a debt the exact amount of which cannot be known at the time that the mortgage is given. In the present case, as has been stated, whether there will be any debt at all, is problematical and remote, for it must depend, first, upon whether there is a breach of the agreement and, if so, upon the very uncertain result of the trial in court of a disputed question of fact or of law or both. The result would have to be reduced to a judgment to make it amount to a debt. In view of all these considerations, of which the parties may be assumed to have taken cognizance when entering into the contract, we think it is clear that the mortgage was intended to cover the grape crops for the years named as security only for the note, and that the provisions relating to the marketing of the grapes and the furnishing the plaintiff with supplies were, as the trial court concluded, solely intended to preserve the security or operate as additional security for the payment of the note and also perhaps to give to defendant the benefit of such commissions as accrued from its services in marketing the grapes and of the profits resulting from the sale to plaintiff of the supplies.

In the transcript the defendant sets out certain specifications of error in the rulings of the court upon the evidence and also on the motion to strike out certain portions of the answer. The rulings, the correctness of which is so challenged, bear directly upon and involve the question of the construction of the language of the instrument which we have considered, and thus practically the assignments themselves have been herein considered and disposed of.

The judgment is affirmed.

Ellison, P. J., *pro tem.*, and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 18, 1919, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision by the district court of appeal

of the third appellate district, we desire to say that in so far as the opinion of the district court of appeal may be construed as holding that a mortgage may not be given to secure damages that may arise from a breach of contract, we express or intimate no opinion as to the correctness thereof. This matter is not essential to the decision.

The application for a hearing in this court is denied.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 3019. Second Appellate District, Division Two.—October 20, 1919.]

HARRY S. VAN DEMARK, Respondent, v. CALIFORNIA HOME EXTENSION ASSOCIATION (a Corporation), et al., Appellants.

- [1] **CONTRACTS—"DISSATISFACTION CLAUSES"—EXERCISE OF RIGHT.**—The distinction is well recognized—though the line cannot always be very clearly drawn—in actions arising on "dissatisfaction clauses" of contracts that where the right involved is one which is submitted to the taste or fancy, feeling, or judgment of the party in whose favor the option is given, it may be exercised without any practical or utilitarian reason; but when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded.
- [2] **ID.—GENERAL RULE—PARTY TO BE JUDGE—GOOD FAITH.**—Where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith; and if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him.
- [3] **ID.—PERSONAL DISSATISFACTION OF BUYER—ELEMENT OF VALUES OR QUALITY IMMATERIAL.**—Where it is clear that the purpose of an agreement to repurchase in the event the buyer should become "dissatisfied with the investment" is to submit the matter to the personal option and judgment of the purchaser, the exercise of this right is not dependent upon a failure in value of the property, or

a breach of any condition of the contract. It is made a question alone of the buyer's dissatisfaction with the "investment"—a matter which might develop into a condition of personal dissatisfaction entirely independent of values or quality.

- [4] **ID.—EFFECT OF FULFILLMENT OF AGREEMENT.**—The fulfillment of the terms of such an agreement does not involve the loss of the vendor's property, but amounts only to a rescission. He gets his property back and refunds the purchase money with interest.
- [5] **ID.—DISSATISFACTION WITH INVESTMENT—PLEADING.**—In an action by the buyer under such a contract it is sufficient to allege that he became dissatisfied with the investment, without alleging any facts as reasons or grounds for such dissatisfaction.
- [6] **ID.—LIMIT OF OBLIGATION TO REPURCHASE—TIME—CONSTRUCTION OF AGREEMENT.**—An agreement to repurchase "at any time between the fifth and sixth year from the date of planting" does not limit the obligation to repurchase to the infinitesimal period between the close of the last day of the fifth year and the beginning of the first day of the sixth year, but to the period between the last of the fifth and the last of the sixth year—or during the sixth year.
- [7] **ID.—REASONABLE CONSTRUCTION.**—It is a well-settled principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair, unusual, and extraordinary, and another construction equally consistent with the language would make it reasonable, fair, and just, the latter construction is the one which must be adopted.
- [8] **ID.—CONSTRUCTION OF—SURROUNDING CIRCUMSTANCES.**—Where contracts are ambiguous, the circumstances surrounding and known to both parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred. H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. T. Quinn for Appellants.

Bowen & Bailie for Respondent.

SLOANE, J.—The only questions on this appeal arise on the construction and application of provisions in a contract for the sale of land, whereby it is agreed that in the event of the purchaser becoming dissatisfied with the investment the seller shall buy back the land.

The complaint contained two causes of action, based on agreements to repurchase, under separate contracts for the sale of separate tracts, and judgment was against the defendants, appellants here. The repurchase clause in the first contract is as follows: "Art. 10. If after completion of payments the buyer should be dissatisfied with the investment, the association stands ready at any time between the fifth and sixth year from date of planting to buy back the land by paying the buyer the amount of the purchase price." The second provides: "Art. 6. If after completion of purchase the buyer should be dissatisfied with the investment, the association guarantees at any time during the sixth year following date of this contract . . . to buy back the land." It will only be necessary to incidentally refer to any other subject matter of these contracts, as no dispute exists on any other of the conditions pleaded.

The complaint also contains an allegation that within the period specified in the contracts plaintiff became dissatisfied with his investments, and so notified the defendant corporation, and demanded that the agreement to repurchase be fulfilled. No facts are stated as to reasons or grounds for dissatisfaction with the investment. Defendants urged on demurrer that without some showing of reasonable grounds for dissatisfaction the complaint does not state a cause of action, and the overruling of this demurrer is one of the alleged errors on appeal. It is claimed by respondent that certain facts set up in the answer gave substantial reasons for dissatisfaction with the investment, thus supplementing the complaint, and there was evidence introduced on this point; but the court found that the matters pleaded in the answer were not true, and as no error is claimed as to such finding, the question is purely one of law as to whether under the terms of this agreement it was incumbent on the plaintiff to plead and prove facts constituting reasonable grounds for dissatisfaction with his investment.

[1] The distinction is well recognized—though the line cannot always be very clearly drawn—in actions arising on these "dissatisfaction clauses," that where the right involved is one which is submitted to the taste or fancy, feelings, or judgment of the party in whose favor the option is given, it may be exercised without any practical or utilitarian reason; but when it is apparent that the

question of satisfaction relates to the commercial value or quality of the subject matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded. [2] "But where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith; and if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him." (*Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, [182 Pac. 428].) Such construction of the rule has been applied to contracts for a suit of clothes, a portrait, a musical instrument, a carriage, a steam heater, a literary article for a magazine, horses, employment of a servant, dissatisfaction with a home furnished, and with security for performance of an obligation. (9 Cyc. 618, and citations; *Singerly v. Thayer*, 108 Pa. St. 291, [56 Am. Rep. 207, 2 Atl. 230]; *McCarren v. McNulty* (Mass.), 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136, [18 Am. Rep. 463]; *Zaliski v. Clark*, 44 Conn. 218, [26 Am. Rep. 446]; *Moore v. Robinson*, 92 Ill. 491.) It has been held in California that an agreement to furnish title satisfactory to the purchaser was not met by a merely good and marketable title, if the purchaser himself was not satisfied. (*Parkside Realty Co. v. MacDonald*, 166 Cal. 426, [137 Pac. 21]; *Allen v. Pockwitz*, 103 Cal. 85, [42 Am. St. Rep. 99, 36 Pac. 1039]; *Church v. Shanklin*, 95 Cal. 626, [17 L. R. A. 207, 30 Pac. 789].)

The contracts considered under the decisions cited by appellant are for the most part clearly distinguishable from the contract under consideration here. They involve the quality or value of things in common use which have a fixed and recognized standard of fitness and worth, and concerning which it is fair and equitable to require a purchaser to be satisfied with the commonly accepted standard of excellence. And sometimes, too, the courts have been controlled in their rulings on this question by the equities involved in cases where the exercise of a captious and unreasonable feeling of dissatisfaction would involve the other party to the contract in serious loss or damage. (*Hawkins v. Graham*, 149 Mass. 284, [14 Am. St. Rep. 422,

21 N. E. 312].) [3] We think it is clear in this case that the purpose of the agreement to repurchase in the event the buyer should become dissatisfied with his investment was to submit the matter to the personal option and judgment of the purchaser. The exercise of this right is not dependent upon a failure in value of the property, or a breach of any conditions of the contract. It was made a question alone of his dissatisfaction with the "investment"—with that particular disposition of his capital which tied it up in this California land—a matter which might develop into a condition of personal dissatisfaction entirely independent of values or quality. [4] The fulfillment of the terms of the agreement, moreover, does not involve the loss of the vendor's property. It amounts only to a rescission. He gets his property back and refunds the purchase money with interest. [5] It was probably incumbent on the plaintiff to show good faith, and that he was really dissatisfied; but an allegation that he did become dissatisfied, which was pleaded and testified to, was sufficient. Incidentally, it appears by the plaintiff's evidence, not only that he was dissatisfied, but that he had grounds for his dissatisfaction, in that by reason of unseasonable frosts the growing eucalyptus trees on his land had been injured. The defendants pleaded, by their answer, that the injury to the premises resulting from the freeze was the fault of plaintiff, but the court found against this defense, and there was evidence to the contrary; but in any event, the finding is not made an issue on this appeal.

[6] Appellants further contend that the exercise of the right to demand a repurchase under the "dissatisfied" clauses of the contracts came too late, in the first instance, and too early, in the second. It is argued that the obligation to buy back the land under the first contract "at any time between the fifth and sixth year from the date of planting" was limited to the infinitesimal period between the close of the last day of the fifth year and the beginning of the first day of the sixth year. It is agreed that the date of planting referred to was the 28th of July, 1910. The declaration of dissatisfaction and demand that defendant repurchase was made on July 17, 1915—about the middle of the sixth year after the date of planting. A literal and exact interpretation of the language used would sustain

appellants' contention. But such an interpretation would be absurd and unreasonable. Inapt though the language may be, it means, in the common acceptance, the period between the last of the fifth and the last of the sixth year—or during the sixth year. As counsel for appellants admits in his brief, the contracts were doubtless drawn by and on forms prepared by the defendant corporation; and to permit the defeat of this contract by the refinement of construction here demanded would be a travesty on justice.

The contention that the demand on the second contract was premature is even more untenable. It was there provided that the defendant corporation "guarantees at any time during the sixth year following the date of this contract to buy back the land." The date of the contract was February 7, 1910. It is not the sixth year after 1910, but the sixth year after February 7, 1910, that was specified. The first year after or following the date of the contract expired February 7, 1911; and the fifth year expired February 7, 1915. The declaration and demand by plaintiff was made on the 12th of August, 1915, which was during the sixth year.

Appellants' own guns may properly be turned against them in this connection by quoting their argument and citation on another point of construction, from another part of their brief: "There is no better rule of construction than that laid down by this [supreme] court in the case of *Stein v. Archibald*, 151 Cal. 220, [90 Pac. 536], where it is said: [7] 'It is a well-settled principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair, unusual, and extraordinary, and another construction equally consistent with the language would make it reasonable, fair, and just, that the latter construction is the one which must be adopted. [8] It is also a principle of construction with respect to ambiguous contracts that the circumstances surrounding and known to both parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed.'" It is apparent that it was the intention of the parties that if, for any reason not growing out of the wrong or fraud of the purchaser, he became dissatisfied with his investment under the first contract, the vendor would repurchase at any

time during the sixth year after July 17, 1915; and if he was dissatisfied after the completion of his purchase under the second contract, that the vendor would repurchase at any time during the sixth year after date of the contract. That he did become dissatisfied with these contracts and was entitled to exercise the option given him against the defendant corporation is sufficiently pleaded and proved.

The rulings and judgment of the court are supported by the pleadings, evidence, and findings.

The judgment is affirmed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 3015. Second Appellate District, Division Two.—October 20, 1919.]

T. A. GREENLEAF, Appellant, v. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Respondent.

[1] **NEGLIGENCE—ACTION FOR DAMAGES FOR BURNING OF WAREHOUSE—ORIGIN OF FIRE—PREPONDERANCE OF EVIDENCE—ERRONEOUS INSTRUCTION.**—In an action for damages for the burning of a warehouse and its contents by reason of the alleged negligent act of defendant's janitor in placing and leaving a can of hot ashes and coals against the rear end of the building, it is prejudicial error to instruct the jury that "if a preponderance of the evidence fails to satisfy you that the fire was so caused, or leaves in your mind any doubt, confusion, or uncertainty as to the origin of the fire, your verdict should be for the defendant."

[2] **ID.—EVIDENCE—CUSTOM OF JANITOR—REBUTTAL.**—Where in such action the janitor had testified that he knew that he had poured water on the ashes taken up on the evening preceding the fire, and gave as a reason for his certainty that he had wet them down on this particular night, that he did it every night—in other words, that it was his invariable custom, the court committed error in excluding evidence offered to rebut the janitor's statement that it was his invariable custom to pour water on them before depositing them in the container.

2. Admissibility of evidence of custom on question of negligence, notes, 10 L. R. A. 366; 41 L. R. A. (N. S.) 683.

- [3] **ID.—CONTRADICTION OF OWN WITNESS—FOUNDATION NECESSARY.**—While, in order to discredit his own witness by showing that he had on other occasions made inconsistent statements, it is necessary that the party calling him show that he has been taken by surprise, it is not necessary that the element of surprise be shown as a condition of contradicting the witness by independent evidence as to the facts.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. T. A. Norton, Judge. **Reversed.**

The facts are stated in the opinion of the court.

S. V. Wright and Lamy & Putnam for Appellant.

Pillsbury, Madison & Sutro and Paul M. Gregg for Respondent.

SLOANE, J.—Plaintiff, the appellant here from a judgment against him in the superior court of San Luis Obispo County, charged in his complaint the burning of his warehouse and its contents by reason of the negligent act of defendant's servant in placing and leaving a can of hot ashes and coals against the rear end of the building.

It is alleged that the rear wall of the structure, which was of boards standing up and down, was ignited by the hot and burning coals. The undisputed testimony established the fact that defendant's janitor was accustomed to depositing ashes from a heating-stove in defendant's building in a can or container in close proximity to plaintiff's building, and that on the evening of the night of the fire the container was freshly filled with ashes from this stove, which had been burning throughout the day. Some time in the night the warehouse was discovered on fire. The evidence fairly indicates that the fire had originated at or near the point where the ash container was placed, and no other explanation of the fire than from these ashes is suggested. The wareroom contained cans and receptacles of gasoline, oils, and other inflammable liquid. The circumstances shown in evidence were such as to justify the submission of the cause of the fire to the jury, and we do

3. Impeachment of own witness, notes, Ann. Cas. 1914B, 1120; 21 L. R. A. 426.

not see how a verdict, either for or against the plaintiff, would be open to attack for insufficiency of the evidence.

The ground relied on by plaintiff on this appeal is alleged error of the court in giving and refusing instructions, and in its rulings excluding certain testimony in behalf of the plaintiff. There are only two specifications which we need to consider.

[1] After the jury was correctly informed that they could determine their verdict by a preponderance of the evidence, and were instructed as to what constituted preponderance of the evidence, the following instruction was given: "Before you can find a verdict for the plaintiff the evidence must satisfy you that the fire was caused by the acts of the agent or employee of the defendant in placing hot ashes containing fire near or against plaintiff's warehouse; and if the preponderance of the evidence fails to satisfy you that the fire was so caused, *or leaves in your mind any doubt, confusion or uncertainty as to the origin of the fire, your verdict should be for the defendant.*" (Italics ours.) To what avail are the instructions as to the sufficiency of a preponderance of the evidence to support a verdict, and as to its efficacy if it produces unprejudiced conviction in their minds, when followed by the explicit direction that the degree of certainty indicated must not only be beyond a reasonable doubt, but must not admit of any doubt at all? Even in a criminal case, requiring the minds of the jurors to be satisfied beyond a reasonable doubt, this instruction would be erroneous. That it must be considered prejudicial, under the state of the evidence here, there can be no question. The learned trial judge evidently recognized the vice of this instruction as submitted to him, and attempted to remedy it by inserting the words "preponderance of the evidence"; but the mere knowledge of the jurors that they might be governed by a preponderance of the evidence was not enough, when they were told that the effect of such preponderance must be such as to remove *any doubt* as to the origin of the fire. Respondent argues that the error, if any, in this instruction, was not prejudicial, for the reason that plaintiff had offered an instruction which was given by the court, and which laid down the same rule as that objected to, as to the required weight of the evidence. We do not find it so. In plaintiff's

instruction it was declared that in order to find for the plaintiff facts must be established "by the preponderance of the probabilities" to their "satisfaction as reasonable men"—or, in effect, to their reasonable satisfaction. That is very different from an instruction that they cannot find for the plaintiff if a preponderance of the evidence "fails to satisfy you that the fire was so caused, or leaves in your mind any doubt, confusion, or uncertainty as to the origin of the fire."

[2] The second point of error which requires consideration is the ruling of the court excluding evidence bearing upon the custom of the janitor, Williams, in pouring water on the hot ashes before placing them in the container adjacent to plaintiff's building. The janitor testified that he knew that he had poured water on the ashes taken up on the evening preceding the fire, and gave as a reason for his certainty that he had wet them down on this particular night, that he did it every night—in other words, that it was his invariable custom. The witness Walters, a former employee of the defendant, and who had been subpoenaed on behalf of the defendant, being called to the stand by the plaintiff, stated that it was the habit of the janitor to wet down the ashes every evening. The question was asked by plaintiff's counsel: "Was the habit a uniform habit, one strictly adhered to by him? A. Almost invariably. Q. Was it always?" To this question the court sustained the objection that it was incompetent, irrelevant, and immaterial, and not proper direct examination. "Q. Did you observe how frequently he didn't wet the ashes during the period, say a month next preceding the Greenleaf fire? A. He might have omitted once or twice in the course of a month to wet them. Q. You say he might have omitted once or twice; do you know whether he did or not?" Objection sustained. There were other similar questions, objections, and rulings. We think the action of the court excluding this evidence was error.

The evidence sought to be elicited was not offered to prove an omission to wet down the ashes on the night of the fire, by showing that such omission had occurred on previous occasions, but to rebut the janitor's statement that it was his invariable custom to pour water on them before de-

positing them in the container. He had given his "habit" in this matter as a reason for his certainty that the ashes were wet down on the night in question. Every instance of the failure of that habit to work would weaken by that much the ground of the witness' certainty as to the night of the fire. If there is any doubt as to the admissibility of this evidence, it arises on the objection that no foundation for its introduction was shown. The janitor, Williams, who had testified that he was satisfied that he had poured water on the ashes the evening preceding the fire because it was his invariable custom—that he did it every night—was plaintiff's witness. [3] The attempt to show by the witness Walters that sometimes the janitor neglected to put water on the hot ashes before emptying them in the container was in contradiction of plaintiff's own witness. It is contended that while section 2049 of the Code of Civil Procedure permits a party calling a witness to contradict him by other evidence, or by showing that he had made at other times statements inconsistent with his present testimony, this cannot be done until it has been made to appear that the party calling the witness has been taken by surprise by the testimony he seeks to contradict or discredit. That surprise must be shown as a foundation for introducing evidence of contradictory statements of a witness is the general rule, and it is so held in construing section 2049 of the Code of Civil Procedure in *People v. Johnson*, 131 Cal. 511, [63 Pac. 842], *People v. Creeks*, 141 Cal. 529, [75 Pac. 101], and *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 206, [93 Pac. 1049]. But in the numerous cases holding under the common law that one may contradict his own witness by other testimony showing the facts to be different from those stated by the witness, we have failed to find one which suggests that such contradiction can only be made where surprise at the adverse testimony is shown. Greenleaf on Evidence, while recognizing the rule that surprise must be shown as a condition of introducing contradictory statements of the witness, says (section 443), with regard to contradicting one's own witness: "It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony, in direct contradiction to what such witness may have testified, and this not only

where it appears that the witness was innocently mistaken, but even when the evidence may collaterally have the effect of showing that he was generally unworthy of belief." The same rule is stated in substantially the same way in 40 Cyc. 2766, with a multitude of citations from the federal courts and the courts of upward of thirty states. The above quotation from Greenleaf on Evidence is cited and approved in *Norwood v. Kenfield*, 30 Cal. 394. Commenting upon this precise point, the supreme court of Maine, in *Brown v. Osgood*, 25 Me. 505, says: "But as to the matter of surprise it is believed to be referable, legitimately, only to the question whether, when a party has produced a witness who testifies adversely, he shall be allowed to show that the witness had on a former occasion made a different statement."

We believe that the excluded testimony was admissible under section 2049 of the Code of Civil Procedure. But in any event, the palpably erroneous and misleading instructions justify the granting of a new trial.

The judgment is reversed.

Finlayson, P. J., and Thomas, J., concurred.

[Crim. No. 677. Second Appellate District, Division Two.—October 20, 1919.]

THE PEOPLE, Respondent, v. EDWARD SHWARTZ,
Appellant.

- [1] **CRIMINAL LAW—DISTINCTION BETWEEN LARCENY AND FALSE PRETENSES.**—The distinction between larceny and false pretenses is that in larceny the owner of a thing has no intention to part with his property therein to the person taking it, although he may intend to part with possession, while in false pretenses the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud.
- [2] **ID.—OBTAINING MONEY BY FALSE REPRESENTATION—INTENTION OF PERSON PARTY PAYING—NATURE OF OFFENSE.**—Where in a pro-

1. Distinction between larceny and obtaining money by false pretenses, note, 2 ANN. CAS. 1010.

ecution for the crime of grand larceny it is shown by the evidence that the money which the defendant is charged with having unlawfully and feloniously converted to his own use was delivered to him by the complaining witnesses upon the false representation that he had influence with the police commission and that he could obtain for them with the money a license to conduct a certain business, it being also shown that it was not the intention when the money was delivered that it should become the property of the defendant, but was to be paid by him to some unknown and supposed to be actually existing person, but who as a matter of fact was a spurious and mythical individual, the offense is grand larceny and not obtaining money by false pretenses.

- [3] **ID.—DISTINCTION BETWEEN LARCENY AND FALSE PRETENSES—INSTRUCTION PROPER.**—Where possession of money is obtained by fraud, trick, or device, the question whether the crime, if any there be, is larceny or false pretenses often depends upon a nice analysis of facts and legal principles; therefore, in such a case, it is allowable to give an instruction pointing out the distinction between these two classes of crime in order that, if the jurors believe the money was obtained by fraud or trickery, they may acquit the defendant of the charge of larceny if they also believe that the complaining witness intended parting with the title to defendant.
- [4] **ID.—INDICTMENT CHARGING SEVERAL COUNTS—FORM OF VERDICT AND JUDGMENT.**—A separate verdict on each of the ten counts upon which a defendant is convicted constitutes a sufficient compliance with section 954 of the Penal Code, as amended in 1915, whereby it is provided that every "offense upon which the defendant is convicted must be stated in the verdict"; and there is no impropriety in the court pronouncing, and the clerk entering, a separate judgment upon each of the ten verdicts—each judgment being in the form of an indeterminate sentence as provided by the indeterminate sentence law.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank R. Willis, Judge. Affirmed, except as to the one count.

The facts are stated in the opinion of the court.

Warren L. Williams for Appellant.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn and Arthur Keetch, Deputies Attorney-General, and Jerry H. Powell for Respondent.

FINLAYSON, P. J.—Defendant, who was convicted of the crime of grand larceny, appeals from the judgment and from an order denying a new trial.

The grand jury of Los Angeles County returned an indictment against defendant containing twenty-eight counts. In fourteen counts defendant is charged with the crime of grand larceny; in the remaining counts he is charged with the crime of obtaining money by false representations and pretenses. Before the submission of the cause to the jury the court, for insufficiency of the evidence, withdrew from the jury's consideration all the counts wherein defendant is charged with the crime of obtaining money by false representations and pretenses, and, for the same reason, withdrew from the jury's consideration four of the counts wherein larceny is charged. Defendant was convicted of grand larceny, as charged in each of the remaining ten counts.

In each of the counts upon which defendant was convicted it is charged that he willfully, unlawfully, and feloniously took, stole, and carried away a certain sum of money, the amount being specifically stated in each instance. There was a number of complaining witnesses. The theory of the prosecution was that each complaining witness was engaged in the business of conducting a bath and massage parlor in the city of Los Angeles, for the conduct of which a license from the city's police commission is required by law—a license that must be renewed every six months; that prior to obtaining each license or its renewal, defendant visited each complaining witness and falsely represented to her that he had influence with the police commission, and, for a certain designated sum of money, he could and would obtain the desired license or its renewal; and that, in each instance, the complaining witness, believing such false representation, delivered the stipulated sum of money to defendant, who thereupon unlawfully and feloniously converted it to his own use. In short, the theory of the prosecution was that defendant was guilty of grand larceny in that he obtained possession of the sums of money by fraud and trickery.

It is claimed by appellant that if the evidence shows him to be guilty of any crime, it is that of obtaining money by false pretenses, and not grand larceny—the crime of which

he was convicted. In support of this claim it is contended that the evidence shows indubitably that each of the complaining witnesses intended to part with the title to her money as well as its possession. [1] The distinction between larceny and false pretenses is substantially this: In larceny the owner of a thing has no intention to part with his property therein to the person taking it, although he may intend to part with possession. In false pretenses the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. (*People v. Delbos*, 146 Cal. 734, [81 Pac. 131].) [2] There would be merit in appellant's contention if, when the complaining witnesses delivered the several sums to him, they had intended that the moneys should then and there become his property. So far from such being the case, it appears from the evidence that each complaining witness, at the time when she delivered her money to appellant, intended that it should be received by him for the purpose of carrying it and paying it to some person, unknown to the witness, whom, however, she supposed to be an actually existing person, but who, as a matter of fact, was a spurious and mythical individual, invented by appellant for the fraudulent purpose of tricking the witness into parting with the possession of her money. Thus, in support of the first count, Marie Savage—from whom appellant was charged in count one with taking, stealing, and carrying away \$130—testified as follows: "I told him I would like to get a place, and he asked me if I had any money, and I told him yes, I had, and he asked me how much, and I told him I thought I had enough—that I understood it would be one hundred dollars to get the license; and I gave him one hundred dollars to get me a license. . . . He told me that he could fix it all right. . . . He told me I was to give him one hundred dollars, and after I got the license I was to give him \$25. . . . He told me he could not get it unless I did give him the money. Q. Well, was it to fix somebody? A. Understood to be. . . . Q. Did he say at any time that he would use that money for the police commission to get you a permit? A. Yes, sir. . . . Q. That money, as far as you were concerned, was for the intention or purpose, of corruptly bribing a public official, was it? A. Well, I suppose so. . . . Q. You understood this money,

did you not, was to be given to some public official? A. Yes, but I didn't know who." Had the money been used by defendant, as Marie Savage supposed it would, when she delivered it to him for the purpose of being paid to an unidentified but supposedly existing corrupt public official, it would have remained her property until its final delivery to that person. She did not intend to part with the title to the money until it should be delivered to the public officer whom she supposed defendant had or would corruptly influence to issue or procure the issuance of the license. Defendant, as the complaining witness understood the transaction, was her agent to carry her money to the supposedly perfidious official. The title thus remaining in Marie Savage, it was subject to larceny as her property, and the fraudulent appropriation of it by the defendant to his own use, he having had the intention from the beginning to obtain possession of it for that purpose, constituted, in law, the crime of larceny. (*People v. Delbos, supra.*)

With one exception, presently to be noticed, what has just been said with respect to count one applies with equal force to each of the other counts upon which defendant was convicted. The evidence, in every instance where money was paid to defendant, justified the inference that, with the exception of certain smaller sums agreed to be paid to him as a reward for his nefarious services in his assumed character as a corrupter of men, defendant received the sums delivered to him for the purpose of carrying and delivering them to some supposedly corrupt public official, who, as the evidence shows, did not exist.

[3] It is further contended by appellant that the court erred in that it gave an instruction which, according to appellant, misled the jury to his prejudice. It seems that, notwithstanding it had dismissed every count that charged defendant with obtaining money by fraudulent representations and pretenses, the court, nevertheless, gave an instruction wherein it pointed out the distinction between larceny and the crime of obtaining money by false pretenses. Appellant, conceding that the instruction itself embodies a correct statement of the law, argues that it prejudiced his case in that it was an invitation to the jurors to convict him of the crime of larceny if they believed him guilty of obtaining the moneys by false pretenses. We fail to see

any force in the objection. Where, as here, possession of money is obtained by fraud, trick, or device, the question whether the crime, if any there be, was larceny or false pretenses often depends upon a nice analysis of facts and legal principles. For this reason it is allowable, in such a case, to give an instruction pointing out the distinction between these two classes of crime, in order that, if the jurors believe the money was obtained by fraud or trickery, they may acquit the defendant of the charge of larceny if they also believe that the complaining witness intended parting with the title to defendant. It was proper, therefore, for the court to explain to the jury what constitutes larceny by trick or device, and the difference between such larceny and the crime of obtaining money by false and fraudulent pretenses. It is, indeed, the duty of the court "in charging the jury . . . to state to them all matters of law necessary for their information." (Pen. Code, sec. 1127.)

The thirteenth count—one of the counts upon which appellant was convicted—charges that defendant, on or about November 1, 1917, feloniously took, stole, and carried away \$150, the personal property of one Lyllian Hoffman. It is contended, and, as we think, correctly, that the verdict of conviction on this count is contrary to the evidence. The thirteenth count was based upon an alleged payment of \$150 to defendant by Lyllian Hoffman to secure the renewal of her license on November 1, 1917. On direct examination, when asked if she had paid defendant any money to get this renewal, the Hoffman woman replied: "*If I did I gave him \$150 when I got it [the renewal license] for myself.*" On cross-examination, in reply to a question asking her if she gave defendant any money for the renewal, she said: "*I do not know whether it was in November then or—no; I did not pay for that; no sir.*" This evidence directly negatives any claim that defendant ever received any part of the \$150 which, in the thirteenth count, he is charged with having stolen. Our attention has not been called to any other evidence tending to show that defendant was ever paid any money to procure this particular renewal of Lyllian Hoffman's license, and our own independent search of the record has failed to disclose any evidence to

support defendant's conviction upon this count of the indictment.

[4] The jury brought in a separate verdict on each of the ten counts upon which defendant was convicted. This was doubtless a sufficient compliance with section 954 of the Penal Code, as amended in 1915 [Stats. 1915, p 744], whereby it is provided that every "offense upon which the defendant is convicted must be stated in the verdict." Upon each of the ten verdicts of conviction the court, at the time appointed for sentence, pronounced, and the clerk entered, a separate judgment—each judgment being in the form of an indeterminate sentence as provided by the indeterminate sentence law. (Pen. Code, sec. 1168, as amended March 18, 1917, [Stats. 1917, p. 665].) Appellant makes no objection to the form of the judgment, nor to the fact that, in form, there was a separate judgment upon each of the ten verdicts of conviction; and, under the circumstances, we see no impropriety in the procedure thus adopted by the trial court. As we have said, appellant makes no point respecting the form of the judgment, or that, in form, it appears to consist of ten separate judgments, each based upon a separate verdict of conviction, and we advert to the matter solely because of the form that our judgment must take, owing to the situation presented to us by the record here.

A careful examination of the entire record convinces us that, with the single exception that the evidence fails to support the verdict of conviction of the crime charged against him in the thirteenth count, defendant had a fair and impartial trial, free from any prejudicial error.

The judgment wherein it is recited that defendant was found guilty of the crime of grand larceny as charged in count thirteen of the indictment and adjudging that he be punished for the crime so charged in said count by imprisonment for an indeterminate period, and likewise so much of the order denying defendant's motion for a new trial as denies him a new trial of the issues presented by the thirteenth count, are reversed. In all other respects the judgment or judgments and the order or orders appealed from are affirmed.

Sloane, J., and Thomas, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 18, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2931. First Appellate District, Division One.—October 21, 1919.]

C. F. O'BRIEN, Respondent, v. L. E. WHITE LUMBER COMPANY (a Corporation), Appellant.

- [1] ACTION IN QUANTUM MERUIT—PERSONAL SERVICES—USE OF AUTOMOBILE—WANT OF LEGAL CLAIM.—In this action to recover a given sum as the reasonable value of work and labor and compensation for the use of plaintiff's automobile in the service of the defendant, which sum the complaint alleged was the balance due upon an open and current account between the plaintiff and the defendant, although the claim of plaintiff for back pay was one that might well have been addressed to the generosity of the defendant, plaintiff failed to show any legal claim upon the defendant either for salary or for the use of his automobile.
- [2] ID.—USE OF AUTOMOBILE IN DEFENDANT'S BUSINESS—FURNISHING OF SUPPLIES BY DEFENDANT—COMPENSATION.—Where the use of plaintiff's automobile in the defendant's business was made by plaintiff without any intention of making any charge therefor, other than the value of the gasoline, oil, and tires used in its operation which he drew from the defendant, and was therefore gratuitously given, except to the extent it might be compensated by the value of such supplies, such use cannot form a legal basis for a demand for compensation therefor.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge. Reversed.

The facts are stated in the opinion of the court.

Metson, Drew & Mackenzie, Preston & Preston and R. G. Hudson for Appellant.

W. D. L. Held and J. W. Kingren for Respondent.

RICHARDS, J.—The plaintiff brought this action against the defendant to recover the sum of \$2,189 as the reasonable value of work and labor and compensation for the use of his automobile in the service of the defendant, which sum the complaint alleges is the balance due upon an open and current account between the plaintiff and defendant. The latter answered, denying any liability whatever. A trial had before a jury resulted in a verdict in favor of the plaintiff for \$1,875, for which amount judgment was rendered. The defendant appeals, specifying various alleged errors of law and particularly that the verdict is unsupported by the evidence.

The facts giving rise to the dispute may be briefly summarized as follows: The plaintiff was an employee of the defendant, having sustained that relation to it for some thirty years. In the month of October, 1914, he was defendant's superintendent, his duties as such relating to that part of defendant's business carried on in and around Point Arena, and which consisted of lumbering, the manufacture and shipping of railroad ties, the conduct of a mercantile store, and a limited amount of simple farming, and received for his services a salary of two hundred dollars per month. On the 29th of that month the president of the company addressed to him a letter, the terms of which are as follows:

"Dear Frank:—

"As ties and everything have gone to the 'bow-wows' we will have to put you for the present on half time, beginning November 1, 1914. I dislike to do this but cannot help it. As soon as things brighten you will be given full time again. Please advise me if this is satisfactory. We have made cuts in salaries all over and are letting off some men.

"Cut Emery's salary to \$75.00; cut McCallum to \$75.00. If they are not satisfied we will get somebody else who will be because we cannot continue as things are.

"Very truly yours,

"F. C. DREW."

Testifying to the receipt of this letter, O'Brien said: "I think I answered on receipt of it, probably the same day or the next day. I cannot remember the exact wording of my

letter but as near as I can remember I told him I had shown this letter to McCallum and Emery and they had accepted the cut, and for myself I was willing to help my employer out by going on half time during the financial stringency. I then went ahead with my work the same as I had been." Thereafter and until the defendant sold its business nearly two years later the reduced salary was paid to the two employees named in the letter, and the plaintiff received and accepted as his monthly salary the sum of one hundred dollars, performing, however, practically the same duties as before, and devoting the same amount of the time to the defendant's business. He had access at all times to his account carried on the books of the defendant, wherein he was credited monthly with the sum of one hundred dollars as salary and charged with merchandise purchased by him in the company's store, and with sums of money drawn by him, and was familiar with the contents of this account. From the letter set forth above O'Brien understood "that they [the company] were just short of funds and that was about all that they could afford to pay at that time until times got better or they sold out, and that I was to receive half pay until times got better." He further testified:

"Q. Well, you understood, didn't you, Mr. O'Brien, that you was just to get a hundred dollars a month until times got better?

"A. Yes, sir.

"Q. For your full time, that's right, isn't it?

"A. I understood that he was to pay me a hundred dollars a month until times got better, and from the past dealings I had with him he would pay me the balance when times got better or he sold.

"Q. Well, and times never got any better until they sold out, as you say, never got any better, did they?

"A. No.

"Q. Got worse, didn't they?

"A. Yes, I think they did, if anything."

In April, 1916, the defendant sold its business and property. Shortly thereafter O'Brien wrote to the president of the company a letter in which he said: "Having knowledge of your fairness in all my past dealings with you I am asking if you will not pay me full salary for the past nineteen months," meaning, of course, by full salary the

sum of two hundred dollars per month instead of the one hundred dollars per month that had been paid to him. O'Brien also called on and had some conversation with the president of the defendant in reference to this request, but it was finally refused, and on November 18, 1916, O'Brien rendered a bill to the defendant for the sum of \$1,750, being the difference between one hundred dollars and two hundred dollars per month for the period of seventeen and one-half months. This bill the defendant declined to pay; and shortly thereafter O'Brien brought this action for the sum of \$2,189, the difference between that amount and the \$1,750 previously demanded, being claimed as compensation for the use in defendant's service of plaintiff's automobile. It appears that O'Brien had from a time dating back to about six months before the reduction of his salary owned an automobile which he occasionally used while attending to the business of the defendant, the latter furnishing to O'Brien without charge the gasoline, oil, and tires used in its operation. No previous demand for compensation for this service had ever been made on defendant by O'Brien, not even upon the occasion when in November, 1916, he rendered his bill for back salary.

[1] We think it is quite clear from the foregoing statement of facts that O'Brien had no legal claim upon the defendant either for salary or for the use of his automobile. It is apparent that the letter of the president of the company of November 29, 1914, was understood both by the defendant and O'Brien to mean that from that time forward his salary was to be at the rate of one hundred dollars per month without other change in the conditions of his employment, and that he accepted the reduction of salary. There is some evidence in the record to the effect that the expression "half time" refers to the proportion of the day an employee works; but while it may be conceded that such is the literal meaning of the expression and that it is frequently used in that sense, it is equally true that in the present case it was used by the defendant and understood by O'Brien as referring to the amount of his monthly salary. [2] It is also abundantly clear from the evidence that the use of O'Brien's automobile in the defendant's business was made by O'Brien without any intention of making a charge therefor other than the value of the sup-

plies which he drew from the defendant, and was therefore gratuitously given except to the extent it might be compensated by the value of such supplies. Such use, therefore, cannot form a legal basis for the plaintiff's demand.

The claim of plaintiff for back pay was one that might well have been addressed to the generosity of the defendant as was done, but we can find no legal foundation for it in the evidence which, we are convinced, affords no basis for the verdict of the jury in the plaintiff's favor.

The judgment is therefore reversed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2818. First Appellate District, Division One.—October 21, 1919.]

BELLE N. PETERSEN, as Executrix, etc., Respondent, v.
FLEDA O. BUNTING et al., as Executors, etc.,
Appellants.

- [1] **CONTRACTS—UNILATERAL AGREEMENT TO SELL—ACCEPTANCE BY PURCHASER—PART PAYMENT.**—A unilateral agreement or option to sell certain real property upon stated conditions, one of which is the payment of a given sum of money upon a specified date, becomes a binding agreement upon both parties when upon the day fixed for payment the purchaser pays and the vendor accepts a portion of said sum and the purchaser obtains the vendor's consent to wait thirty days for the payment of the balance.
- [2] **ID.—DEFAULT IN PAYMENT OF BALANCE—RECOVERY OF MONEY PAID.** Such purchaser thereafter being in default, unexcused, in the payment of the balance, and having made no tender of complete performance, and the vendor acknowledging his obligations thereunder and standing upon its terms, the former is not entitled to receive back from the latter the money paid by him.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Donahue, Judge. Reversed

The facts are stated in the opinion of the court.

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1. Options to purchase land, note, 118 *Am. St. Rep.* 597.

Thomas C. Huxley for Appellants.

Robert L. Mann, Sidney M. Van Wyck, Jr., and Curtis Hillyer for Respondent.

RICHARDS, J.—Plaintiff's testator, John M. Wright, obtained from defendants' testator, John A. Bunting, a writing by which the latter agreed to convey to the former certain real estate upon certain conditions, one of which was a payment of forty thousand dollars, to be made upon a specified date. This was signed only by Bunting, and imposed no obligation upon Wright. It contained a provision as follows: "... a failure on your part to make the aforesaid payment of forty thousand dollars on or before the fifteenth day of March, 1919, shall cancel and make void all and singular the obligations established by this instrument." When the date arrived for this payment Wright was unable to make it, but by consent of Bunting paid on account of said first payment ten thousand dollars, whereupon Bunting extended the time thirty days to make payment of the balance thereof by signing a notation to that effect upon the face of the instrument, and also indorsing upon the back of it the following words: "Received on this agreement on this sixteenth day of March, 1909, the sum of ten thousand dollars as part of the first payment of forty thousand dollars herein named," and signing his name to both said notation and said indorsement. Wright failed to pay this sum of thirty thousand dollars at the time named, and admitted to Bunting his inability to make further payments, and subsequently, and without having tendered full compliance with the terms of the agreement, demanded of Bunting that he return the ten thousand dollars already paid. The latter refused to comply with this demand, and justifies such refusal upon the ground that under the terms of the writing Wright was in default, and was therefore not entitled to the return of the money so paid.

By the judgment the plaintiff, who is the executrix of the last will and testament of said Wright, was awarded the return of this ten thousand dollars, together with interest. The defendants appeal, and the question for decision is the construction of the writing above referred to as affected by the payment thereunder made by Wright.

[1] It is the respondent's contention that by virtue of the provision of the writing hereinbefore quoted, the failure of Wright to make the payment of forty thousand dollars on or before the fifteenth day of March, 1909, or on or before the expiration of the thirty days to which the permissible date of said payment was extended, terminated all obligations arising thereunder, and that Wright was entitled to the return of the money paid by him on account of said first payment of forty thousand dollars. We think it quite plain, however, that such a construction entirely ignores the change in the situation as it existed by the mere making and delivery of the instrument which was brought about by Wright's payment of ten thousand dollars on account of the first payment of forty thousand dollars and the extension by Bunting of the time in which the balance thereof might be paid. Until the making of this payment the agreement—if it can be so called—was strictly unilateral and constituted a mere option, to be exercised by Wright or not as he chose. Wright had assumed no obligation thereunder. The provision therein that a failure on Wright's part to make the first payment of forty thousand dollars should cancel the obligations of the instrument referred evidently to the obligations of Bunting and was for his benefit. But when Wright paid to Bunting ten thousand dollars and obtained Bunting's consent to wait thirty days for payment of the balance of the forty thousand dollars, the amount of the first payment called for by the writing, the situation changed. By said payment, in the absence of an express agreement that said payment should not be construed as having that effect, Wright accepted what was theretofore an offer on the part of Bunting to sell his property, and Bunting's acceptance of such payment bound him to comply with the terms of his offer. (*Benson v. Shotwell*, 87 Cal. 49, 54, [25 Pac. 249, 681]; *Eaton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280]; *Reed v. Hickey*, 13 Cal. App. 136, [109 Pac. 38]; *Karahadian v. Lockett*, 33 Cal. App. 413, [165 Pac. 552]; *Russ v. Tuttle*, 158 Cal. 226, [110 Pac. 813]; *Scott v. Glenn*, 98 Cal. 168, [32 Pac. 983]; *Copple v. Aigeltinger*, 167 Cal. 706, [140 Pac. 1073]; *Oursler v. Thacher*, 152 Cal. 739, [93 Pac. 1007]; *McCowen v. Pew*, 18 Cal. App. 302, [123 Pac. 191].)

[2] This brings us to the question whether Wright, being in default, unexcused, in the payments due under Bunting's offer to sell, and having made no tender of complete performance, and Bunting acknowledging his obligations thereunder and standing upon its terms, the former was entitled to receive back from Bunting the money paid by him. That he was not so entitled is well established by the authorities (*Glock v. Howard*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713]; *Oursler v. Thacher*, 152 Cal. 739, [93 Pac. 1007]).

One further question is presented on the appeal. The court admitted evidence offered by plaintiff for the purpose of explaining the construction which the parties themselves placed upon the written instrument. As to the admission of this evidence—which was over the objection of the defendants—two things may be said: First, that the writing was plain and unambiguous and needed no aid in its construction; second, the evidence thus submitted, so far from warranting the construction contended for by the plaintiff and which the court adopted, namely, that the payment of the ten thousand dollars by Wright and its acceptance by Bunting, did not convert what was theretofore an option into an agreement binding upon Bunting, quite conclusively shows that the parties acted on the assumption that it did. Such evidence at most shows that Bunting was willing to give Wright a chance to get back his ten thousand dollars, which he was to have, however, only by carrying through another and different transaction. This also Wright failed to accomplish.

From what has been said it follows that the court erred in awarding judgment to the plaintiff. The judgment is therefore reversed.

Waste, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 20, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 18, 1919.

All the Justices concurred, except Melvui, J., who was absent.

[Civ. No. 3087. Second Appellate District, Division One.—October 21, 1919.]

**F. ISRAEL, Petitioner, v. THE SUPERIOR COURT OF
SAN DIEGO COUNTY et al., Respondents.**

- [1] **PLEADING—ACTION TO RECOVER BAIL MONEY—PERMISSION TO WITHDRAW ANSWER AND FILE ANOTHER—DISCRETION OF COURT—PROTECTION FROM DEFAULT.**—In an action against a justice of the peace to recover bail money deposited by the plaintiff to secure the appearance of a third party at a preliminary hearing upon a criminal charge, which money after the discharge of such third party but prior to its return to the plaintiff was levied upon by the sheriff under a writ of execution issued upon a judgment in an action against such third party, after answer by the defendant and denial of plaintiff's motion for judgment on the pleadings, the court acted within its discretion in granting the defendant leave to withdraw his answer and file another answer within five days, and the answer on file protected the defendant from default to a time when the order granting five days within which to file another answer became operative and in effect.
- [2] **JUDGMENTS—SUBSTITUTION OF DEFENDANTS—RELEASE OF ORIGINAL DEFENDANT—HOW ORDERS REVIEWABLE—MANDAMUS—CERTIORARI.** Where prior to the expiration of the time within which the defendant was given leave to file another answer, upon affidavits being filed and motion made under section 386 of the Code of Civil Procedure, the judgment creditor and the sheriff were substituted as defendants and their answer filed, the money deposited in court, and the original defendant released from further liability, and thereafter the action was tried and judgment rendered that plaintiff take nothing and that defendants recover their costs, the orders of the court substituting the new defendants and releasing the original defendant, though made in excess of jurisdiction, are not subject to review in a proceeding in *mandamus* to compel the court to render a judgment against the original defendant. The court's action should have been annulled in a proceeding in *certiorari*, wherein the original status of both parties would have been restored and their rights protected.
- [3] **ID.—ERRORS IN TRIAL OF ACTION NOT REVIEWABLE.**—In such proceeding in *mandamus* to compel the court to render judgment against the original defendant, the appellate court is not concerned with the alleged errors in the trial of the action against the substituted defendants.
- [4] **ID.—FAILURE TO DETERMINE DEFENDANTS' RIGHTS—PLAINTIFF NOT CONCERNED.**—Where in the action against the substituted defend-

ants the court rendered judgment that plaintiff take nothing, it is no concern of the plaintiff that the court failed to determine the right of the defendants to the fund in question.

PROCEEDING in Mandamus to compel the Superior Court of San Diego County, and C. N. Andrews, Judge thereof, to render judgment against a defendant who had been released from liability, other defendants having been substituted. Writ discharged.

The facts are stated in the opinion of the court.

E. J. Henning and W. H. Wylie for Petitioner.

Eugene Daney and Heskett & Sample for Respondents.

SHAW, J.—This is an original application for writ of mandate to compel the superior court of San Diego County to render a judgment for three thousand dollars in favor of petitioner in a certain action wherein she was plaintiff and Solon Bryan was defendant.

The controversy grows out of the following facts: On the eleventh day of February, 1918, petitioner deposited with Solon Bryan, who was a justice of the peace, the sum of three thousand dollars to secure the appearance of F. M. Couden at a preliminary hearing upon a criminal charge. As a result of the hearing, held on February 21, 1918, Couden was discharged from custody and his bail released. On the same day, and after dismissal of the criminal complaint filed against him and prior to the return of said bail money so deposited with said justice of the peace, there was served upon him, the said Solon Bryan, by the sheriff of the county of San Diego, a writ of execution issued out of the superior court upon a judgment theretofore rendered against F. M. Couden in a certain action wherein the First National Bank was plaintiff and the former was defendant. Thereupon Bryan, upon demand made by petitioner for the return of the three thousand dollars so deposited by her as bail for the appearance of said Couden, refused to pay the same to petitioner, who, on April 8, 1918, brought suit against Bryan to recover the money in question. Within due time Bryan answered the complaint; whereupon petitioner, as plaintiff in said

action, made a motion for judgment on the pleadings, which was heard on May 20, 1918, and an order made denying the same. Thereupon Solon Bryan, as defendant in said action, applied to the court for permission to withdraw the answer so filed and file another answer to the complaint. This application was granted and Bryan allowed five days to file another answer. Within the five days allowed for filing such answer Bryan filed an affidavit and notice of motion, under section 386 of the Code of Civil Procedure, to substitute the sheriff of San Diego County and the First National Bank in his place and stead as defendants in said action, which motion was heard on May 24, 1918, and an order made granting the same, pursuant to which Bryan deposited in court the three thousand dollars which action was followed by an order releasing him from further liability, and at the same time the sheriff and First National Bank, as substituted defendants, filed their answer. No further proceedings of any kind or character were had in said matter until a year thereafter, to wit, on May 31, 1919, at which time the case was tried upon the complaint and the answer of the substituted defendants, when findings were made upon which judgment was rendered by the court that petitioner, as plaintiff in said action, take nothing and the defendants recover \$—, costs. Thereafter, on June 11, 1919, pursuant to notice served, and in the absence of any order made setting aside or otherwise affecting the judgment so rendered, petitioner moved the court to enter judgment in said action for the plaintiff therein and against Solon Bryan, upon the ground that said Bryan having by leave of court withdrawn the answer filed, was in default, and hence plaintiff was entitled to judgment. The motion was denied. The contention of petitioner is that the order granting Bryan five days from May 20, 1918, to file an answer, was void, as were likewise the orders made releasing him from further liability upon depositing the said three thousand dollars in court and substituting as defendants in said action the sheriff and First National Bank.

That the court in permitting the defendant Bryan to withdraw his answer was acting within its jurisdiction is not and, in our opinion, cannot be, questioned in this proceeding. (*Miles et al. v. Danforth*, 37 Ill. 157; *Rowan v.*

Kirkpatrick, 14 Ill. 1; *Bash v. Evans*, 40 Ind. 256.) [1] The orders permitting the withdrawal of the answer and granting leave to file another were made at the same time; hence the answer on file protected defendant from default to a time when the order granting five days within which to file another answer became operative and in effect, prior to the expiration of which time the fund was deposited in court and the order made releasing Bryan from liability. In effect the situation was the same as though defendant, instead of filing the answer so withdrawn, had asked and obtained from the court an extension of time, not exceeding thirty days, within which to answer, as provided in section 1054 of the Code of Civil Procedure. Hence, we are of the opinion that the court, in the exercise of its discretion and acting within its jurisdiction, had power to permit the answer to be withdrawn and to grant defendant time, not exceeding thirty days in addition to that allowed by the code (sec. 1054, *supra*), within which to file an answer. This being true, it must follow that the proceedings had and taken pursuant to the provisions of section 386 of the Code of Civil Procedure, under which Bryan deposited the fund in controversy in court and the substitution of the parties defendant was made, were within the power of the court.

[2] Conceding, however, the court in making the orders complained of acted in excess of jurisdiction, its action should have been annulled in a proceeding by *certiorari*, wherein the original status of both parties would have been restored and their rights protected. Upon the facts presented, this status and protection cannot be secured by a writ of mandate. Indeed, its issuance in this proceeding would not only lead to confusion, but work a gross injustice to one of the parties. In *Board of Education v. Common Council*, 128 Cal. 369, [60 Pac. 976], it is said: "The writ of mandate will not issue where it will work injustice, or introduce confusion and disorder, or operate harshly, or where it will not promote substantial justice." And in *Neto v. Conselho Amor, etc.*, 18 Cal. App. 234, [122 Pac. 973], the court, in discussing the right to such writ, says: "It is not issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injustice." In the case at bar it appears that after the expiration of

more than a year from the making of the order releasing Bryan from liability and under and pursuant to which he parted with the fund in controversy, and without any action on the part of petitioner to set aside the order under which he acted, and after substitution of defendants, who filed an answer putting in issue the allegations of the complaint in said action, a trial thereof was had, in which trial the court found that plaintiff was not entitled to the fund, and rendered judgment based upon said findings that plaintiff take nothing by her action. In thus rendering judgment the court was acting within its jurisdiction; and, conceding that it may have committed error, the judgment stands as a final determination until set aside in some proper proceeding for its review. Under the circumstances shown, to issue a writ requiring the court to render judgment against Bryan would not only lead to confusion and disorder, but it would operate harshly in that it would work an injustice upon Bryan, who, as stated, has, as required by the order of the court, parted with and surrendered the fund to another depository. Had petitioner, as plaintiff in said action, the trial of which she entered upon without protest or objection here reviewable, been successful therein, she would have accepted the result.

[3] In this application we are not concerned with the alleged errors of the court in the trial of the case. It may be, as claimed by petitioner, that the findings made by the court are not supported by the evidence, or that the court failed to make findings upon material issues. [4] However this may be, it appears that the court rendered judgment that plaintiff take nothing and, conceding that the court should have determined the right of defendants to said fund, such question is one for the concern of defendants, and not the plaintiff, whom the court adjudged should take nothing in the action.

The alternative writ heretofore issued is discharged and the proceeding dismissed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 3981. First Appellate District, Division One.—October 23, 1919.]

J. G. ROSSITER, as Administrator, etc., Appellant, v.
ROBERT A. SCHULTZ, Respondent.

- [1] **DEEDS—DELIVERY.**—Where after recordation a deed is mailed by the recorder to the grantee, such delivery is sufficient and title can then vest only in such grantee.
- [2] **RESULTANT TRUST—PAYMENT FOR REAL PROPERTY BY OTHER THAN GRANTEE—PARENT AND CHILD—PRESUMPTION OF ADVANCEMENT.**—The doctrine that a resultant trust arises when a transfer of real property is made to one person and the consideration therefor is paid by another does not arise where the parties concerned are husband and wife or parent and child. In such case the presumption is that the purchase and conveyance were intended to be an advancement for the nominal purchaser.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

The facts are stated in the opinion of the court.

John Dennison for Appellant.

Landreth & Patten for Respondent.

KERRIGAN, J.—Plaintiff, as administrator of the estate of Carrie Smith, deceased, brought this action against the defendant, her son, to establish a resulting trust in two lots in Los Angeles standing in defendant's name. From the judgment quieting the latter's title as prayed for in a cross-complaint filed in the action the plaintiff appeals.

The documentary evidence showed that the decedent in her lifetime contracted to purchase the two lots in question. One of them she bought from one Furth under a contract, her interest in which she assigned to the defendant. Upon making the final payment upon this lot she receipted for a deed wherein the defendant was named as

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1. Deposit of deed in mail as a delivery, note, 5 A. L. R. 1664.
 2. Resulting trust as arising from purchase in name of one spouse with funds of other, notes, Ann. Cas. 1915C, 1082; Ann. Cas. 1915D, 625, 654.

grantee and which, after its recordation, was sent by mail to the defendant at his mother's address.

[1] There is no merit in the contention that such delivery of the deed was insufficient, for it is clear that whatever control the grantor had over the deed was lost when it was mailed by the recorder to the defendant, and title could then vest only in the grantee named in the instrument.

As to the other of said lots, its purchase was contracted for by deceased with one Humbert, the contract providing that upon completion of the payments therein specified a deed was to be given to defendant. The payments on this contract had not been completed when plaintiff's intestate died, but defendant thereafter paid the balance due and took a deed from Humbert in his own name in accordance with the terms of the contract.

It thus appears that at no time did the title to either lot stand in the name of plaintiff's intestate, and the evidence offered by plaintiff, viewed in its strongest light, showed merely that the decedent was in possession of the lots at the time of her death, and that the payments had been actually made by her. To offset any presumption that might be drawn from these facts that the title was taken in the son's name for convenience only and that he held title in trust for his mother, there was the positive testimony of the defendant that he had given his mother the money with which the lots were bought, which testimony fully warranted the trial court in finding that the defendant held the property free of any trust in favor of his mother and was the absolute owner thereof. [2] Indeed, that court would have been justified in reaching such conclusion without that particular testimony, for the doctrine that a resulting trust arises when a transfer of real property is made to one person and the consideration therefor is paid by another does not arise where the parties concerned are husband and wife or parent and child. In such case the presumption is that the purchase and conveyance were intended to be an advancement for the nominal purchaser. (*Hamilton v. Hubbard*, 134 Cal. 603, 605, [65 Pac. 321, 66 Pac. 860].) It may be noted that the only heir of the deceased other than this son was her husband, from whom she was living apart. The only evidence offered in behalf

of plaintiff was that of two persons who held claims against the estate of the deceased of rather dubious origin and merit, and we are fully satisfied with the action of the trial court in refusing to impress the defendant's title with a trust upon the testimony in this record.

Judgment affirmed.

Richards, J., and Beasley, P. J., *pro tem.*, concurred.

[Civ. No. 2967. First Appellate District, Division One.—October 22, 1919.]

JOSEPH PASQUALETTI, Appellant, v. ABRAHAM HILSON et al., Respondents.

- [1] **MECHANICS' LIENS—NOTICE OF NONRESPONSIBILITY—ACKNOWLEDGMENT OF NOT SUFFICIENT.**—The acknowledgment and filing for record of a copy of notice of nonresponsibility does not constitute a sufficient compliance with the requirements of section 1192 of the Code of Civil Procedure, which requires the owner to "file for record a verified copy of said notice."
- [2] **ID.—CONSTRUCTION OF SECTION 1192, CODE OF CIVIL PROCEDURE—STRICT COMPLIANCE ESSENTIAL.**—Section 1192 of the Code of Civil Procedure, as amended in 1911, was intended to require a strict compliance with its provisions on the part of owners of property upon which work or labor was to be done or materials furnished in order to relieve themselves from responsibility for the value of the same under the provisions of chapter 2 of title IV of the Code of Civil Procedure, relating to the liens of mechanics, materialmen, and laborers.
- [3] **ID.—"VERIFICATION"—MEANING OF TERM.**—The term "verified" wherever used in the Code of Civil Procedure requires the oath or affidavit of the party executing the instrument in order to amount to a sufficient verification thereof.
- [4] **ID.—ACTUAL NOTICE OF CLAIM OF NONRESPONSIBILITY—COMPLIANCE WITH STATUTE NOT WAIVER.**—The facts that notice of nonresponsibility was posted upon the property upon which labor was performed and materials furnished and that the lien claimant had actual notice of such claim do not render the filing of such notice in the form required by the statute immaterial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge. Reversed.

The facts are stated in the opinion of the court.

N. A. Dorn and C. D. Dorn for Appellant.

Jos. E. Bien and Abram M. Marks for Respondents.

RICHARDS, J.—This is an appeal by plaintiff from a judgment in favor of the defendants in an action brought by plaintiff to foreclose a mechanic's lien for labor and material alleged to have been supplied upon certain premises of which the defendant Abraham Hilson was the owner and Gee Wo Co. and Won Hink were lessees.

The labor was performed and the material supplied in pursuance of a written contract between plaintiff and the said lessees of the property. Upon the trial of the cause the court rendered its judgment in favor of the plaintiff as against said lessees, but adjudged that as against the defendant Abraham Hilson the plaintiff was entitled to take nothing, and judgment was accordingly rendered in Hilson's favor.

The sole question presented on this appeal is as to whether the said defendant and respondent Hilson had given such notice of nonliability under the provisions of section 1192 of the Code of Civil Procedure as to be relieved of responsibility for the labor and materials furnished by the plaintiff upon his premises.

It appears from the findings of the court that the respondent Hilson posted notice of nonliability upon the premises in question, and also that he undertook to file for record a copy of such posted notice in attempted compliance with the requirements of said section of the code. The language of the code which prescribes that the owner of the premises may relieve himself from liability for work, labor, or materials furnished upon his premises requires that he "give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property; and shall also, . . . file for record a verified copy of said notice in the office of the county recorder of the county in which said property or some part thereof is situated." [1] It is a conceded fact in the record before us that the copy of the notice of nonliability which the respondent Hilson attempted to file and did in

fact file for record under the provisions of this section of the code contained his acknowledgment thereof before a notary public in conformity to the general form of acknowledgments provided by law, but that it did not contain any other or further verification than said acknowledgment. It is the contention of the appellant herein that such acknowledgment of said notice did not amount to a sufficient compliance with the requirements of the section of the code above quoted, and did not constitute a verification of said notice within the meaning of said section so as to relieve the said respondent from responsibility to the appellant herein.

We are constrained to agree with the contention of the appellant in this regard. [2] Section 1192 of the Code of Civil Procedure, as the same was amended in 1911, [Stata. 1911, p. 1313], was evidently intended to require a strict compliance with its provisions on the part of owners of property upon which work or labor was to be done or materials furnished, in order to relieve themselves from responsibility for the value of the same under the provisions of chapter 2 of title IV of the Code of Civil Procedure, relating to the liens of mechanics, materialmen, and laborers. The language of said section of the code requires the filing for record of "a verified copy of said notice in the office of the county recorder." [3] The term "verified" wherever used in the Code of Civil Procedure of this state requires the oath or affidavit of the party executing the instrument in order to amount to a sufficient verification thereof; and we are entirely satisfied that the use of the term "verified" in the particular section of the code under review carried this meaning. This view is strengthened by the further and concluding clauses of said section which, after providing what the notice in question should contain, expressly requires that the copy thereof to be recorded shall be "verified by anyone having knowledge of the facts." It would seem to be quite clear that a mere acknowledgment of the execution of such a notice by the person signing the same would not amount to a verification thereof and would not suffice to satisfy the requirements of these clauses of the section of the code in question in that regard. And it follows necessarily that the copy of the motive of nonresponsibility which was filed for record

by said respondent Hilson was insufficient to constitute a compliance with said section of the code so as to relieve him from responsibility to the plaintiff.

[4] It is, however, contended by said respondent that since the notice in question was posted upon the property upon which the plaintiff performed his labor and furnished his supplies, and the court found as a fact that the plaintiff had actual notice of the respondent's claim of nonliability, the failure of the respondent to file said notice in the form required by the statute becomes thereby immaterial. In support of such contention the respondent directs our attention to the case of *Street v. Hazard*, 27 Cal. App. 263, [149 Pac. 770], which seems to sustain said contention. An examination of that case, however, discloses that the notice which was therein held sufficient was given prior to the date of the amendment to said section of the code requiring the recordation of a copy of the posted notice of nonliability on the part of the owner of premises, and hence the ruling of the court in said case is not pertinent to the case at bar.

The respondent further contends that the claim of lien filed by the plaintiff herein was insufficient in form, and for that reason he was not entitled to recover in this action as against the respondent Hilson. This contention we find to be without merit, since an examination of the plaintiff's claim of lien discloses that it contains all of the statutory requirements for such an instrument, and that there is no variance between the form and contents of said claim of lien and the averments of the plaintiff's amended complaint; nor is there any material variance between the contents of said claim and the proofs proffered by the plaintiff upon the trial of the cause.

It follows that the trial court was in error in its conclusions of law and judgment that the plaintiff was entitled to take nothing as against the respondent Hilson.

Judgment reversed.

Kerrigan, J., and Beasly, P. J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 18, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2014. Third Appellate District.—October 22, 1919.]

W. R. CAMBRIDGE, Respondent, v. BENJAMIN C. RAMSER, Appellant.

- [1] **PLEADING—SALE OF SAWMILL AND TIMBER—FAILURE TO PAY—SUFFICIENCY OF COMPLAINT.**—In this action arising out of an agreement for the sale and purchase of a sawmill and certain logs and timber, for which the vendee agreed to pay within a reasonable time, the possession of which it was alleged the defendant was wrongfully and unlawfully withholding from the plaintiff, the defendant having been let into possession but not having paid any part of the purchase price, although over six months had elapsed and he had used over one hundred and fifty thousand feet of logs and timber in running the sawmill and applied the sums realized from the lumber produced for his own uses and purposes, the complaint, though somewhat inartificially drawn, stated a cause of action, and the general demurrer was properly overruled.
- [2] **ID.—REASONABLE TIME—QUESTION OF FACT—SPECIAL CIRCUMSTANCES—NECESSITY TO SET UP IN ANSWER.**—The question of “reasonable time” is generally a question of fact and depends upon the circumstances of each particular case. If there are any special considerations that would tend to rebut or to controvert plaintiff’s theory that a reasonable time has elapsed, it is incumbent upon the defendant to set them up in his answer.

APPEAL from a judgment of the Superior Court of Modoc County. Clarence A. Raker, Judge. Affirmed.

The facts are stated in the opinion of the court.

Oscar Gibbons for Appellant.

Jamison & Wylie for Respondent.

BURNETT, J.—The plaintiff in the action alleged that he is the owner of a certain sawmill and certain lands connected therewith, upon which there is a large quantity of timber suitable for manufacturing lumber; “that in the month of January or February, 1918, the said defendant represented to plaintiff that he could secure the necessary money to purchase the said mill from plaintiff, and agreed with plaintiff that if said plaintiff would place him in the possession of the said sawmill and furnish him with timber to run the said sawmill, he could and would procure

the money to pay plaintiff for the same within a reasonable time thereafter; that relying upon the said representation of defendant that he could within a reasonable time secure the money to pay to plaintiff the purchase price of said mill, plaintiff put the said defendant in possession of the said sawmill and furnished him with a large amount of logs then lying in the yard of said mill, and gave him permission to use the said logs for manufacturing lumber with the said mill, and gave him permission to cut and use the said timber standing and being on plaintiff's said land for use in the said mill; that the said defendant has failed and neglected to pay to plaintiff any part or portion of the purchase price of said mill, and has used in running the said mill all of said logs lying in said yard and has cut timber in said lands of plaintiff for the use of the said mill; that it was agreed that defendant would pay to plaintiff for the said sawmill the sum of five hundred dollars; that said defendant also agreed with plaintiff that he would pay him at the rate of one dollar per thousand feet for all logs and timber used by defendant in running the said sawmill, taken from the timber belonging to plaintiff as aforesaid. And that the said defendant has, since he took possession of the said sawmill, used therein about one hundred and fifty thousand feet of logs and timber in running the said sawmill, and has used the sums realized from the lumber produced from said logs and timber for his own uses and purposes and has paid nothing to plaintiff on account of said logs or timber; that all of the representations of defendant made to plaintiff to induce him to place the said defendant in possession of the said sawmill and furnish him with the said logs and lumber to the effect that he could and would procure the money to pay for the same within a reasonable time, were and are false and fraudulent, and were designedly, falsely, and fraudulently made by defendant to plaintiff, with the intention and for the purpose of inducing plaintiff, and did induce plaintiff to place the defendant in the possession of said sawmill and permit the defendant to use the said logs and timber." There is a further allegation that defendant is wholly insolvent and is threatening and intends to remain in possession of said sawmill, and to cut and use the plaintiff's said timber to plaintiff's great damage and loss, and that the

defendant is now wrongfully and unlawfully, and without right, withholding the possession of said sawmill from the plaintiff. There was a demurrer to the complaint upon the ground "that said complaint does not state facts sufficient to constitute any cause of action against the defendant herein." The demurrer was overruled, and defendant declining to answer, judgment by default was entered for plaintiff, from which the appeal has been taken.

[1] While the complaint is somewhat inartificially drawn, it is quite manifest that it states a cause of action, and that the general demurrer was properly overruled. Viewing the complaint in one aspect, we find the allegation of an agreement to sell on the part of plaintiff and to purchase by defendant a certain sawmill belonging to the former for the sum of five hundred dollars, and also certain logs and growing timber on the land of plaintiff for the consideration of one dollar per thousand feet; that the purchase price was to be paid within a reasonable time; that in pursuance of said agreement defendant took possession of said property and has not paid any part of the purchase price. The only element of the agreement that is at all uncertain is as to the time when the purchase price was to become due. It appears, however, that the agreement was entered into in January or February of 1918, and the action was commenced on August 29th of the same year. This period might very properly be determined by the court to constitute a reasonable time; in other words, the facts were sufficient for the court to conclude that the obligation to pay the purchase price had matured. [2] If there were any special considerations that would tend to rebut or to controvert this theory, it was incumbent upon the defendant to set them up in his answer. The question of "reasonable time" is generally a question of fact and depends upon the circumstances of each particular case. (*Luckart v. Ogden*, 30 Cal. 547.) Again, the pleader has attempted to set up fraud, which would avoid the entire contract of sale and purchase. The facts are hardly alleged according to the accepted rules of pleading, but they are probably sufficient as against a general demurrer. Upon this theory the contract could be treated as entirely void and plaintiff could recover the possession of the property thus fraudulently obtained by defendant. In another view

of the complaint it may be regarded as an action to prevent and enjoin a threatened injury to real property in the nature of waste. (*Hatton v. Gregg*, 4 Cal. App. 545, [88 Pac. 594].) At any rate, since there was no demurrer for uncertainty, we are satisfied that the ruling of the lower court was correct and the judgment is, therefore, affirmed.

Ellison, P. J., *pro tem.*, and Hart, J., concurred.

[Civ. No. 3107. Second Appellate District, Division One.—October 22, 1919.]

MRS. CLOTILDE LAUZIER, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—OWNING AND RENTING OF HOUSES —NOT A "BUSINESS"—LIABILITY FOR INJURIES TO EMPLOYEE.—

The owning and renting of four small houses for residence purposes does not constitute a "business" within the meaning of the Workmen's Compensation Act, and the owner is not liable under the act for injuries received by a carpenter employed for about one hour to repair the roof of one of the houses.

[2] ID.—CONSTRUCTION OF AMENDMENT OF 1917.—The amendment of 1917 to the Workmen's Compensation Act (Stats. 1917, p. 831), providing "The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade name, articles of incorporation or principal business of the employer to the contrary notwithstanding," did not work an extension of the ordinary definition to be applied to the terms "trade or business," but was designed to have a clarifying effect only upon the original terms of the enactment.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Walter F. Dunn and John P. Dunn for Petitioners.

A. E. Graupner for Respondents.

1. Who are employers within the meaning of the compensation statutes, note, L. R. A. 1918F, 179.

JAMES, J.—*Certiorari*. Petitioner was the housekeeper, living with her son-in-law and daughter, where she performed some service and for which she received, as expressed in her own language, her "board and upkeep." In addition to this she was given by a son the sum of \$25 per month to assist in her support. At the same time she owned four small frame houses which she rented to tenants, the net income from which, offsetting expenses, appears to have been, during the period immediately preceding the event concerned herein, no amount whatsoever. An agent attended to the renting of these houses and collected the rental thereof. This agent employed a carpenter to repair the roof of one of the houses; the time consumed was about one hour and the charge made for the service thirty cents. While descending from the roof the carpenter fell and was injured. He afterward prosecuted a claim against the petitioner under the Workmen's Compensation Act. The commissioners, by a majority decision, made an award against petitioner requiring the payment of a considerable sum of money for hospital bills, physicians' charges and expenses, together with a weekly allowance to continue during disability. It is the contention of the petitioner that the award made to the applicant was without authority of law and should be annulled. The particular finding made by the commission, the conclusions contained in which the petitioner contends are not justified by the evidence, was the following:

"The general and usual occupation of the defendant was that of housekeeper. She owned four houses which she rented for residence purposes, upon one of which houses the applicant was employed as aforesaid, to make certain repairs upon the roof. Such repairs could have been made within one day, and at a cost less than one hundred dollars (\$100), and said employment was therefore casual. But the maintaining and renting of said houses was a trade, business, profession or occupation of the employer, and the repair of said houses was a service tending toward the preservation, maintenance or operation of the business premises or property of the employer, and, therefore, that at the time of said injury the employee was not engaged in any of the occupations or employments excluded by section 8 of the

Workmen's Compensation Insurance and Safety Act of 1917, from the provisions of said act and the employee and the employer were subject to the compensation provisions of said act and to the jurisdiction of this commission."

[1] The case here turns altogether upon the question as to whether the owning and renting of the four small houses constituted a "business" within the meaning of the Compensation Act. That act, as amended in 1917 (Stats. 1917, p. 831, at p. 836), provides in part as follows: "The phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer. The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade name, articles of incorporation or principal business of the employer to the contrary notwithstanding." As we understood the argument of respondent, it is not contended that under the ordinary definition to be given to the words "trade or business," the owning and renting of a house or houses by a person would bring such person within the terms of the compensation act. If the conclusion were otherwise, then it would be immaterial whether the individual owned one or twenty houses, so long as they were rented to other persons and an income derived therefrom. Under the English act, which has furnished the model and substance for many of the state enactments covering this subject, including our own (*Fidelity etc. Co. v. Industrial Acc. Com.*, 177 Cal. 614, [L. R. A. 1918F, 856, 171 Pac. 429]), it has been directly held that a landlord owning several houses and having an interest in others, all of which were let to tenants, was not engaged in "a trade or business" within the meaning of the law. Petitioner has cited to this point a pertinent decision, that being *Bargewell v. Daniel*, 98 L. T. Rep. 257, cited in *In re Gaynor*, 217 Mass. 86, [L. R. A. 1916A, 363, 104 N. E. 339]. Our own supreme court, in *Miller & Lux, Inc., v. Industrial Acc. Com.*, 179 Cal. 764, [7 A. L. R. 1191, 178 Pac. 960], made this observation: "We should keep in mind the fact that the Compensation Act is held constitutional only because it imposes a charge

not upon the individual employer, but upon the branch of industry in which he is engaged, and gives the employer opportunity of protecting himself by proper insurance." [2] It is argued, however, by respondent in justification of the award made that the amendment to the act made in 1917 worked an extension of the ordinary definition to be applied to the terms "trade or business" and made appropriate the inclusion of conditions which the facts of this case disclose. Particular emphasis is placed upon the amendatory phrases that the words "trade, business, profession or occupation of the employer," "shall be taken to include any undertaking actually engaged in by him with some degree of regularity." As we interpret that amendment, it is designed to have a clarifying effect only upon the original terms of the enactment. The use of the word "undertaking" we think of itself does not make less applicable the ordinary definition of the word "business," and we believe that that phrase should be read as though the word "business" immediately preceded the word "undertaking." Such seems to us to be the evident and plain meaning. It was no doubt the intention by the amendment to make it clear that the act should cover a business undertaking, whether the same was continually carried on or only engaged in at intervals. We do not intend to intimate it as our opinion that because the principal business of the petitioner was that of housekeeper, she might not, still within the meaning of the Compensation Act, be engaged in other business enterprises. We hold simply that the mere owning and renting of a house or houses by an individual for purposes of investment, conceding that such owner has no particular or principal business, does not come within the purview of the act.

The findings and award of the respondent commission are annulled.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 8103. Second Appellate District, Division One.—October 22, 1919.]

VICTOR A. ROSSBACH, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

- [1] **DEPOSITION—INSUFFICIENT COMPLAINT—DEMURRER SUSTAINED—REFUSAL OF DEFENDANT TO ANSWER INTERROGATORIES—POWER TO PUNISH FOR CONTEMPT.**—The superior court has jurisdiction to adjudge a defendant guilty of contempt for his refusal to answer interrogatories in a proceeding regularly instituted by the plaintiff to take his deposition under the provisions of section 2021 of the Code of Civil Procedure, after the sustaining of a general demurrer to the complaint with leave to file an amended complaint, the time within which to file the same not having expired, and prior to the exercise by plaintiff of such right.
- [2] **ID.—BRINGING OF SUIT—WHAT CONSTITUTES—RIGHT TO TAKE DEFENDANT'S DEPOSITION.**—The filing of the complaint constitutes the bringing of the action, and the plaintiff's right to have the defendant's deposition taken depends not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file.

PROCEEDING in Prohibition to prevent the Superior Court of Los Angeles County, and Grant Jackson, Judge thereof, from adjudging petitioner guilty of contempt. Dismissed.

The facts are stated in the opinion of the court.

Byron D. Seaver and George L. Greer for Petitioner.

Edward Winterer for Respondents.

SHAW, J.—Prohibition. Has the superior court jurisdiction to adjudge a defendant in an action guilty of contempt for his refusal to answer interrogatories in a proceeding regularly instituted by the plaintiff to take his deposition under the provisions of section 2021 of the Code of Civil Procedure, after the sustaining of a general demurrer to the complaint, with leave to file an amended complaint, the time within which to file the same not having

expired and prior to the exercise by plaintiff of such right?

As appears from the petition, a general demurrer was sustained to the complaint with leave to amend, after which and before plaintiff had exercised her right under an order of court granting her leave to file an amended complaint, the proceedings for the taking of the deposition of defendant were instituted. Defendant appeared, was duly sworn, and, upon the advice of his attorney, refused to answer certain questions propounded to him. Whereupon he was cited to appear before the court and show cause why he should not be adjudged guilty of contempt for such refusal. Upon the hearing of the matter it was ordered that he appear before the notary and give answers to the questions so propounded; otherwise the court would adjudge him guilty of contempt and punish him therefor.

[1] The contention of petitioner is that the court had upon general demurrer held the complaint insufficient, and in the absence of any sufficient complaint on file there was no pleading under which the defendant could be required to give his deposition. We are not in accord with this contention. Section 2021 of the Code of Civil Procedure is broad and comprehensive. It provides: "The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases," when he is a party to the action. It conclusively appears that the witness whose deposition was sought to be taken was a party to an action as distinguished from a special proceeding, and that he had appeared therein; and the statute in plain and explicit terms provides that the testimony of such witness may be taken by deposition in an action *at any time after his appearance*. In the case of *San Francisco Gas etc. Co. v. Superior Court*, 155 Cal. 30, [17 Ann. Cas. 933, 99 Pac. 359], it was claimed there was no issue as to which depositions could be taken, for the reason that the case had been tried and was then pending on appeal in the supreme court. In discussing the point the court, speaking through the late Chief Justice Beatty, said: "It may be answered to this objection that in case of an *action*, it is not requisite that an issue of fact

should have arisen in order to authorize the taking of depositions. As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint or upon the allegation of new matter in the answer, and there is, perhaps, some significance in the distinction made by the statute in this particular between actions and special proceedings. Clearly, therefore, the existence of an actual, as distinguished from a potential, issue of fact is not, by the terms of the statute, made a conclusive test of the right to take depositions *de bene esse*." To like effect is *Kibele v. Superior Court*, 17 Cal. App. 720, [121 Pac. 412], upholding the right to take a deposition before issue joined by answer; and *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, [91 Pac. 593], where it is said: "There is no provision or rule of law to the effect that a deposition may not be taken before an issue of fact has been raised."

[2] The filing of the complaint constituted the bringing of the action (Code Civ. Proc., sec. 405), and plaintiff's right to have defendant's deposition depends not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file. (*San Francisco Gas etc. Co. v. Superior Court, supra.*)

Moreover, the ruling of the court in sustaining the general demurrer to the complaint might on an appeal by plaintiff be reversed, thus bringing the case within the facts considered in the case last cited, upholding the right to have a deposition taken for use in a possible new trial granted on an appeal from an order denying a motion therefor.

To sustain petitioner's contention would not only nullify the plain provisions of section 2021, but destroy the right given by statute for the perpetuation of testimony, as in neither case could a witness be required to testify against his will.

The alternative writ heretofore granted is discharged and the proceeding dismissed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1853. Third Appellate District.—October 22, 1919.]

MOULTON IRRIGATED LANDS COMPANY (a Corporation), Respondent, v. **M. T. JONES et al.**, Appellants.

[1] **CONTRACTS—GRANT OF RIGHT OF WAY FOR CANALS—CONSIDERATION—DISTRIBUTION OF WATERS ON LANDS OF GRANTOR—DUTY OF GRANTEE.**—A contract granting a right of way through lands in and along a certain slough for the purpose of constructing and maintaining a canal for irrigation purposes, and for storing and conveying water therein over and across said lands, in consideration of the construction and maintenance of certain bridges and a free water right for the water necessary for the irrigation of the lands of the grantor, and providing that for the water actually used for irrigation the grantor shall pay the same rate and be subject to the same rules, terms, and conditions as all other water users, does not impose any duty upon the grantee to raise the water by artificial means above the level of the water in the slough that it might by the force of gravity be distributed over said lands.

APPEAL from a judgment of the Superior Court of Colusa County. Ernest Weyand, Judge. Affirmed.

The facts are stated in the opinion of the court.

Brown & Albery for Appellants.

Thomas Rutledge for Respondent.

BURNETT, J.—The action was brought to recover the sum of \$1,472.50 for water furnished by plaintiff to defendants for irrigation, and plaintiff had judgment as prayed for, from which the defendants have appealed. The contract, which is the basis of the action, was executed on December 17, 1912, by defendant, Jones, and one Wm. K. Brown, the assignor of plaintiff. By the terms of said contract Jones granted to Brown a right of way through lands of the former in and along a certain slough, known as Drumhiller Slough, for the purpose of constructing and maintaining a canal for irrigation purposes and for storing and conveying water therein over and across said land belonging to Jones, which was specifically described in said

contract. A right of way was also conveyed for two certain canals connecting with said slough. One of the considerations moving from Brown was the covenant binding him and his successors or assigns to construct and maintain across said Drumhiller Slough upon the land of Jones, as he might thereafter designate, two bridges at least eighteen feet wide, each capable of sustaining a burden of not less than five tons in weight, and also to construct and maintain on each of said canals suitable means of crossing the same and of sufficient strength to safely carry a combined harvester and kindred machinery. It was further covenanted and agreed that Jones should have "a free water right for the water necessary for the irrigation of his lands [described in said contract] as long as said proposed irrigation system should be used in any part thereof for such purposes, such water right to be appurtenant to said land." It was further provided: "For the water actually used by the party of the first part [Jones] for irrigation in and upon said lands aforesaid, he shall pay therefor at the same rate and be subject to the same rules, terms and conditions as all other water users along said proposed system, but shall only be required to pay each year for such water for irrigation purposes as shall apply only to such of his lands as are actually irrigated." Said contract contains certain other important provisions, but they need not be quoted, as the foregoing involves the only question at issue in the present case. Appellant admits that there is "virtually but one question in this case: Was the defendant, Jones, justified, as a matter of law, in incurring the expense for pumping water from the canal or slough and charging that expense as an offset to the water rates?"

In explanation of this it may be said that no controversy appears to have arisen between the parties until the year 1915. It is also admitted that during the years 1915 and 1916, covering the entire period in controversy, water was used from said slough to irrigate the lands of defendant Jones. It is further conceded that the rate for said irrigation was established at five dollars per acre and that applying said rate to the number of acres irrigated by said water the amount would be the sum claimed by plaintiff. It appears, however, that about seventy-five or eighty acres of

Jones' land was at such a level that, in order to distribute the water over it, it was necessary to use pumps or other mechanical contrivance to raise the water above the level of said slough. It appears, further, that a demand was made by Jones upon plaintiff to so raise the water that it might by the force of gravity be distributed over said land. Plaintiff neglected and refused to comply with this demand, and thereupon Jones put in the necessary pumps for said purpose and thereby incurred an expense of something over one thousand dollars, and it is for this expense that he claims an offset against the claim of plaintiff. The question, therefore, involves the proper construction of said provision of the contract of December, 1912. It is to be observed that there is nothing in the express terms of the contract that required plaintiff to incur any additional expense besides the construction of said canal and bridges and crossings and the pumping of the water out of Sacramento River into said slough. [1] There was no promise or agreement to distribute the water over the land of Jones or to raise it by any artificial means above the level of the water in said slough. The easy and natural construction of the language used leads us to the conclusion that for the right of way granted by Jones the water from the river would be pumped into said slough and that he should have a right to divert what was necessary of said water for the irrigation of his land, paying therefor the amount that was charged to other parties using the same, and being subject to the same rules, terms and conditions. The claim of appellant, however, is based upon the fact that in 1915 and 1916 respondent introduced water-wheels for the purpose of irrigating some high land belonging to itself and to some others, which it had sold to said parties under special agreement to distribute the water over said lands. We are satisfied, however, that the contract made by the parties did not contemplate that plaintiff's assignor or his successors in interest should be bound to incur this additional expense for the purpose of irrigating the lands of Jones. The expression, "rules, terms and conditions," was doubtless intended to include the rate, and the rules and regulations which might thereafter be adopted for the use of water, such as the hours for its distribution, or the order or proportion in which various property owners

should use it at certain seasons of the year, or the distribution of it according to the quantity of water that might be available. The very expression used, "subject to," would indicate a burden to be imposed upon appellant rather than an additional privilege to be enjoyed by him. The contention of appellant really amounts to the claim that respondent is bound to distribute the water over his land. With equal propriety he might claim that respondent is under obligation to grade his land, to construct checks and to do whatever else is necessary to properly and evenly distribute the water over it. The unreasonableness of appellant's claim is aptly illustrated in the instance before us. The expense of raising the water by pumping for the seventy-five or eighty acres in controversy was, as we have seen, something over one thousand dollars. The charge for water used in said irrigation at five dollars per acre could not be over four hundred dollars; therefore, according to the theory of appellant, respondent must pay him six hundred dollars for the privilege of furnishing him water for the purpose of irrigating his land. Such construction, we think, was never contemplated by the parties and is not within the fair import of the terms used in the contract. We are satisfied that the judgment of the lower court was eminently sound. It is, therefore, affirmed.

Ellison, P. J., *pro tem.*, and Hart, J., concurred.

[Civ. No. 3082. First Appellate District, Division One.—October 23, 1919.]

WILLIAM T. BLAKELEY, Respondent, v. H. W. BRYSON
et al., Appellants.

- [1] **CONTRACTS—TRANSFER OF REAL PROPERTY TO HOLDER OF NOTE—RIGHT TO SELL.**—Where the maker of a promissory note which is past due and unpaid, in consideration for the holder's agreement to refrain for five days from suing upon the note, executes and delivers to such holder of the note a grant deed to certain real estate and also a separate agreement wherein such liability and default is recited, and it is provided that if said indebtedness is not paid within five days thereafter the grantee is authorized to sell the property at either public or private sale without notice, and credit the amount received therefor upon the indebtedness,

and there is no intent upon the part of those giving and receiving said deed that it shall be given as security for the payment of the note, upon default in the payment of the indebtedness within the five days the grantee is not obliged to bring an action under the terms of section 726 of the Code of Civil Procedure to realize upon such property, but may proceed in accordance with the written agreement with the grantor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. L. Abrahams and W. I. Gilbert for Appellants.

Wm. T. Blakeley for Respondent.

RICHARDS, J.—This is an appeal from a judgment in the plaintiff's favor in an action to recover upon a promissory note executed by the defendants and passing by mesne transfers to the plaintiff. Several amendments were made to the original complaint which are not material to the points presented upon this appeal. The defendants' answer pleaded as a special defense that while one D. B. Brunson was the owner and holder of the note sued upon the defendant, Bryson had made, executed, and delivered to said Brunson a grant deed to certain real estate, which was intended to be and was received by said Brunson as security for the payment of said note. Upon the trial of the cause the defendants offered and there was received in evidence said alleged deed and also an agreement between said Bryson and Brunson of even date with said deed, wherein it was recited that Bryson was indebted to Brunson in the amount evidenced by said promissory note and that said note was past due and unpaid, and that said Bryson desired Brunson to refrain from taking legal proceedings for the collection of the amount due upon said note, and that therefore, and as a consideration therefor, the said Bryson was causing said deed to be executed to said Brunson upon the understanding and agreement that if his said indebtedness to said Brunson was not paid within five days thereafter, the said Brunson was authorized to sell the property covered by said deed at either public or private sale without notice, and credit the amount received therefor

upon said indebtedness. No other explanation appears to have been offered at the trial as to the understanding of the parties to said deed and agreement beyond that contained in the latter instrument itself, and the trial court in deciding the case found that the consideration for said deed was that the grantee therein would refrain from suing upon said note for the period of five days from the date of said conveyance, and further found that the said deed was not given as nor intended to be a mortgage or other security for the payment of said note. The evidence in the case further showed, and the court found, that the lands described in the said deed had been sold pursuant to the terms of said agreement, and the amount received therefor credited upon said note. The judgment of the court was in the plaintiff's favor for the balance found to be due upon the note.

[1] The sole contention made by the appellants upon this appeal is that the conveyance above referred to was given as security for the payment of the note in question, and was in effect a mortgage, and hence that the plaintiff was not entitled to maintain this action, but should have brought an action under the terms of section 726 of the Code of Civil Procedure for the foreclosure of said mortgage.

There is not the slightest merit in this contention, since there was no evidence before the trial court showing any intent upon the part of those giving and receiving said deed that it should have any such effect; but, on the other hand, the written agreement between said parties expresses its purpose, and negatives such an intent.

Judgment affirmed.

Bealy, P. J., *pro tem.*, and Kerrigan, J., concurred.

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[Civ. No. 3080. First Appellate District, Division One.—October 23, 1919.]

C. W. GATES, Respondent, v. OSWALD KEHLET et al.,
Defendants; L. M. ARMSTRONG, Appellant.

- [1] **LANDLORD AND TENANT—RETAKEING OF POSSESSION BY LESSOR—LEASE NOT TERMINATED.**—Where the original lessor takes possession of the leased premises and relets the same under an express agreement that he is doing so for the benefit of the original lessee and his assignees and that his act in so doing and the reletting of the premises by him is not in any manner to relieve the lessees or any of them of liability for the rent of the premises as provided in the lease, the original lease is not thereby terminated.
- [2] **ID.—ASSIGNMENT OF LEASE—AGREEMENT WITH ASSIGNEE AS TO RETAKING—ORIGINAL LESSEE NOT RELIEVED FROM LIABILITY.**—The fact that the agreement as to the terms and conditions of the lessor's retaking of the possession of the leased premises and attempt to relet the same was made with the assignees of the lease, who were then in possession of the premises, and not with the original lessee, did not relieve the original lessee from further liability for the rent provided in the lease where under the terms of the original lease and of the assignments thereof the original lessee was expressly made liable for the whole unpaid portion of the rentals due under the original lease.
- [3] **ID.—ACCEPTANCE OF POSSESSION BY LESSOR—SUBSEQUENT RELETING—RIGHT TO RECOVER LOSS FROM ORIGINAL LESSEE.**—Where a landlord accepts the possession of rented premises from his tenant upon the understanding and agreement that he does so for the latter's benefit and in order to relet the premises on the latter's behalf, he has a right to recover from the tenant and from whom-ever else has made himself liable therefor the difference between what he has been able, in good faith, to let the property for and the amount agreed to be paid under the terms of the original lease.
- [4] **ID.—PLEADING—RECOVERY OF "RENT" OR "DAMAGES."**—Where the original lessee, in an action to recover such difference, states the facts upon which he relies for a recovery, his right of recovery is not affected by the fact that he does not denominate the amount he claims to be due in the body or prayer of said complaint as rent or damages.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Stuart M. Salisbury for Appellant.

Barstow, Rohe & Jeffers for Respondent.

RICHARDS, J.—This is an appeal by the defendant Armstrong from a judgment in favor of plaintiff in an action brought to recover a sum of money alleged to be due under the terms of a certain lease and of an alleged agreement on the part of said Armstrong guaranteeing the performance of the terms and conditions of said lease.

This appeal is based upon the judgment-roll alone, and the only two questions presented by the appellant are, first, as to whether the findings of fact are sufficient to support the judgment, and, second, as to whether the plaintiff's amended complaint contains facts sufficient to constitute a cause of action.

The following is a summarized statement of the findings of the trial court, which we must assume upon the record before us are fully sustained by the evidence in the case: On the twenty-fourth day of September, 1912, the plaintiff and respondent herein as lessor, and the defendant and appellant Armstrong herein as lessee, made and entered into a written lease of certain premises in the city of Los Angeles at a rental of \$125 monthly during the first year of the term of said lease, and of \$150 per month during the remaining four years of said term, which said term of said lease was to expire on the thirtieth day of September, 1917. Said defendant Armstrong entered into possession of said premises under said lease. Thereafter, and on the fourth day of December, 1913, the said Armstrong, with the consent of his lessor, assigned all of his interest in said lease to the defendant herein, Oswald Kehlet, upon the express condition that said Armstrong should remain liable to the said lessor for the performance by Kehlet of all the terms and conditions of said lease. Thereafter and on the first day of May, 1914, the said defendant Kehlet, with the consent of the original lessor, assigned all of his interest in said lease to the defendants herein, Mary E. and Ade Orrill, upon the express condition and agreement that the said defendants, Armstrong and Kehlet, should and did become and remain guarantors for the performance by

the said assignees of Kehlet of all of the terms and conditions of said lease. Thereafter the premises became vacant, and so remained from October, 1914, to May, 1915, during all of which time the defendants had the keys to and possession of said premises. In the month of May, 1915, the defendant Ade Orrill gave the keys of said premises to the plaintiff upon the express understanding and agreement that the plaintiff would make what effort he could to rent said premises, but only on behalf of, and for the benefit of, the defendants herein, and that neither they nor any of them would thereby be relieved from any liability whatever, but that in case the said premises were relet for any sum less than the stipulated rental thereof under the terms of said lease and of said assignments thereof, the lessor would expect the defendants to pay him the difference. That the plaintiff in the exercise of reasonable diligence did succeed on or about June 1, 1915, in obtaining a tenant for said premises for a stipulated rental of \$75 per month up to December 31, 1915, and thereafter again rented said premises for the period between January 1, 1916, and December 31, 1916, at a stipulated rental of \$90 per month, but that said premises then became vacant and so remained between January 1, 1917, and September 30, 1917, the date of the termination of the original lease of said premises. That after crediting the amounts so received from the succeeding rentals of said premises through the efforts of said plaintiff upon the total sums due and payable under the terms of said original lease there still remained due the sum of \$2,325 as rent of said premises, for which sum, together with certain expenses, costs, and counsel fees, the court rendered judgment against each and all of said defendants. From the judgment so rendered the defendant Armstrong prosecutes this appeal.

[1] The said appellant's first contention is that the findings do not sustain said judgment, his claim being that the surrender of said premises by the defendants Orrill to said plaintiff and his acceptance of the same and the subsequent reletting of the premises by him terminated the original lease, and thereby relieved the said appellant Armstrong of any further liability for the rent thereof under his agreement and guaranty. We can perceive no merit in this contention in view of the facts as found by the court that the re-

taking of the possession of said premises on the part of the plaintiff as the original lessor thereof was under an express agreement that he was doing so for the benefit of the defendants, and that his act in so doing and the reletting of the premises by him was not in any manner to relieve the lessees, or any of them, of liability for the rent of said premises as provided in said lease. [2] The burden of the appellant's contention, however, seems to be that this agreement as to the terms and conditions of the plaintiff's retaking of the possession of said premises and attempt to relet the same was made with the defendants Orrill, who were then in possession of the premises, and was not made with the appellant, and that he therefore is not bound thereby. The difficulty about this contention is that under the terms of the original lease and of the assignments thereof by both Armstrong and Kehlet, the appellant Armstrong was made expressly liable for the whole unpaid portion of the rentals due under said original lease, and that he had guaranteed the payment of the same, and that the agreement which the plaintiff made with the Orrills was made for his benefit, and that he was in nowise affected other than advantageously by said agreement, and hence cannot complain of it. The agreement between the plaintiff and the Orrills did not work a termination of the estate created by the terms of said original lease, or of their assignment thereof, but only worked a termination of their possession for their benefit and for the benefit of their two preceding lessees. The authorities cited by the appellant upon this point do not sustain his contention and have no application to a state of facts such as the findings in this case reveal. [3] On the other hand, it has been held by this court that where a landlord accepts the possession of rented premises from his tenant upon the understanding and agreement that he does so for the latter's benefit and in order to relet the premises on the latter's behalf, he has a right to recover from the tenant and from whomever else has made himself liable therefor the difference between what he has been able, in good faith, to let the property for and the amount agreed to be paid under the terms of the original lease. (*Baker v. Eilers Music Co.*, 26 Cal. App. 371, [146 Pac. 1056].) We therefore see no merit in the appellant's first contention.

As to his remaining point, that the plaintiff's amended complaint fails to state a cause of action, it is mainly supported by the argument of counsel for the appellant in support of his first contention, and hence falls with it. [4] The suggestion that the plaintiff's said complaint is defective because the plaintiff is said to be suing for "rent" and not for "damages" has no merit. The plaintiff states in his amended complaint the facts upon which he relies for a recovery, and does not denominate the amount he claims to be due in the body or prayer of said complaint as either rent or damages; and even if he had done so, it would not affect his right of recovery of the sum due as either upon the facts set forth in the complaint.

Judgment affirmed.

Kerrigan, J., and Beasley, P. J., *pro tem.*, concurred.

[Civ. No. 2903. First Appellate District, Division Two.—October 23, 1919.]

GEORGE O. RICH, Appellant, v. MOSS BEACH REALTY COMPANY (a Corporation), Respondent.

- [1] FINDINGS—FACTS IN ISSUE.—Findings should be confined to the facts in issue, the province of the court being to determine but not to raise issues.
- [2] APPEAL—UNSUPPORTED STATEMENTS IN BRIEFS.—An appellate court will not consider statements in briefs which find no support in the record on appeal.
- [3] ID.—ACTION FOR COMMISSIONS—CONFLICTING FINDINGS—MISCARriage OF JUSTICE.—In an action for the balance due on an open book account for commissions claimed by the plaintiff for making sales of land owned by the defendant a finding that the plaintiff had a written contract entitling him to thirty-five per cent of the selling price of lots conflicts with a finding that the reasonable value of the plaintiff's services was twenty-five per cent of the selling price of the lots, but in no case in excess of the amount paid by the purchasers, and on appeal on the judgment-roll alone from a judgment based on the latter finding the appellate court cannot disregard either of these findings or say that the plaintiff is entitled to a judgment in accordance with the

first of the two findings, but if the first finding is correct, judgment in accordance with the second finding constituted a miscarriage of justice.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge. Reversed.

The facts are stated in the opinion of the court.

Ross & Ross and J. J. Lermen for Appellant.

J. E. Pemberton for Respondent.

BRITTAİN, J.—The appeal is on the judgment-roll alone. The suit is for the balance due on an open book account for commissions claimed by the plaintiff for making sales of land owned by the defendant. The answer was twice amended. In the answer on which the parties went to trial the debt was denied, and a counterclaim also alleged to have been on an open book account was set forth. The case was tried by the court without a jury on June 1, 1916, and it was found that the defendant was indebted to the plaintiff in the sum of \$2,672.35, which sum was about one hundred dollars less than the plaintiff claimed, and it was further found that none of the allegations of the answer or counterclaim was true except the allegation of corporate existence of the defendant. Judgment was entered in favor of the plaintiff for the amount found to be due with interest, the aggregate being \$3,257.78.

Motion for new trial was granted on September 29, 1916, at which time no appeal from the order was permitted. (Code Civ. Proc., sec. 963.) The order limited the new trial to "the single issue as to the value of the services rendered by the plaintiff, in his complaint alleged to have been performed, no evidence having been offered or introduced by either party as to the reasonable value of said services, but that as to all other issues said motion for new trial was denied."

According to the new findings, prior to July 1, 1909, the defendant entered into a written contract with the plaintiff employing him as agent to sell its subdivision of real property "for a commission of thirty-five (35%) per cent of the selling price of the property so sold by him"; and,

that pursuant to said contract the plaintiff secured various persons who offered to buy different parcels of land and the defendant entered into a written contract of purchase and sale with each such person. Then follows in the findings a statement showing a list of names of twenty-five purchasers, the purchase price of the respective lots agreed to be paid by them in their written contracts with the defendant, the amounts respectively paid by them, and the amounts paid on account of commissions in each instance. The aggregate purchase price was \$14,540.50; the amount of commissions at thirty-five per cent would have been \$5,190.17. The table showed the purchasers had paid on their contracts \$5,145.88; the plaintiff had received \$2,413.39; the difference between this amount and thirty-five per cent of the purchase price is \$2,776.78. The court further found that the reasonable value of the plaintiff's services "is twenty-five per cent of the purchase price under each contract, not exceeding, however, the amount received by the defendant on account of the purchase price under the respective contracts of purchase," which amount was found to be \$2,639.58 on account of which the plaintiff had received \$2,413.39 theretofore paid him, leaving a balance of \$226.19. The court expressly repeated the findings concerning the untruthfulness of the defendant's answer and counterclaim. The judgment was for \$226.19 and interest, making a total of \$311.43. There was no express finding concerning the balance due on the alleged open book account. In support of the judgment it is argued that such a finding must necessarily be implied.

The appellant argues that the finding in regard to the reasonable value of the services was outside of any issue raised by the pleadings and that it should be disregarded. [1] The rule is that findings should be confined to the facts in issue, the province of the court being to determine but not to raise issues. (*Burnett v. Stearns*, 33 Cal. 468; *Ortego v. Cordero*, 88 Cal. 221, [26 Pac. 80]; *Rudel v. Los Angeles Co.*, 118 Cal. 286, [50 Pac. 400]; *Riverside etc. Co. v. Gage*, 108 Cal. 240, [41 Pac. 299].) Under the order granting the motion for new trial upon the single issue of the value of the services, the plaintiff went to trial. The appeal being on the judgment-roll alone, it does not appear what objection, if any, the plaintiff made at that time.

In support of the judgment and in the absence of any showing to the contrary, it might be inferred that the plaintiff waived objection which might possibly have been made to the trial of that issue. Similarly from the findings it might be inferred that on the trial of that issue, the written contract between the plaintiff and the defendant was introduced in evidence and that other evidence was introduced. None of the evidence is before this court. It may be that there were matters presented for the determination of the trial court upon which, upon proper findings, the second judgment might have been supported.

On behalf of the respondent a brief has been filed in which are unsupported statements of fact concerning the relationship of the parties and the validity and construction of the contract which the trial court found was made. [2] The rule that an appellate court will not consider statements in briefs which find no support in the record on appeal is too well established to require citation of authority. There are other unsupported statements in the respondent's brief which are denied in the closing brief of the appellant. There is nothing in the record by which this issue of fact can be determined by this court. Based on these unwarranted statements in the respondent's brief is the argument that the appellant has not made it to appear on this appeal that justice has miscarried, and that the judgment ought to be affirmed under the provisions of section 4½ of article VI of the constitution. [3] In the absence of any evidence, it appears the finding that the plaintiff had a written contract entitling him to thirty-five per cent of the selling price of lots conflicts with the finding that the reasonable value of plaintiff's services was twenty-five per cent of the selling price of the lots, but in no case in excess of the amount paid by the purchasers. This court cannot disregard either of these findings. In view of the conflict it cannot say that the appellant is entitled to a judgment in accordance with the first of the two findings, but if the first finding is correct, it would clearly appear that there was a miscarriage of justice in rendering judgment in accordance with the second finding.

The judgment is reversed.

Langdon, P. J., and Nourse, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 22, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 22, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Crim. No. 472. Third Appellate District.—October 23, 1919.]

THE PEOPLE, Respondent, v. JESSE MARTINEZ,
Appellant.

- [1] **CRIMINAL LAW—APPEAL—FAILURE TO FILE BRIEF OR ORALLY ARGUE—AFFIRMANCE OF JUDGMENT.**—Where on appeal from a judgment in a criminal prosecution no brief is filed by either party, nor any appearance made by the appellant at the argument on the day set therefor in the appellate court, it must be assumed that the appeal has been abandoned and the judgment should be affirmed for want of prosecution.
- [2] **ID.—CASE AT BAR—PERUSAL OF RECORD BY APPELLATE COURT—JUST CONVICTION—MODIFICATION OF JUDGMENT.**—On this appeal from a judgment of conviction of statutory rape, although no brief was filed by either party, nor any appearance made by the appellant at the argument on the day set therefor in the appellate court, the cause having been submitted on the record upon motion by the attorney-general, the appellate court carefully perused the pleadings, the evidence, and the instructions, together with the rulings of the court upon the admission and rejection of evidence, and was convinced that the defendant, after a fair and impartial trial, was justly convicted of the crime of statutory rape with which he was charged. The judgment, however, was amended by striking out the words "for the term of not more than fifty (50) years, the exact term to be determined as provided by law."

APPEAL from a judgment of the Superior Court of Stanislaus County. L. W. Fulkerth, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

A. J. Carlson for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

ELLISON, P. J., *pro tem.*—Defendant was informed against by the district attorney of Stanislaus County, state of California, in which he was charged "with having on or about the twentieth day of August, 1918, in the county of Stanislaus, state of California, and prior to the filing of this information, willfully, unlawfully and feloniously accomplished an act of sexual intercourse with and upon one Catherine Medina, then and there a female under the age of eighteen years, to wit, of the age of twelve years, and not then and there the wife of the said 'Jessie' Martinez."

[1] Defendant, on the first day of July, 1919, secured from this court an order extending his time to and including the twentieth day of July, 1919, within which to file his opening brief on appeal from the judgment of conviction, the attorney-general, by stipulation, having previously agreed thereto. No brief was filed by either party nor was any appearance made by the defendant at the argument on the day set therefor in this court, nor was any further stipulation or order made extending defendant's time to file his brief. Upon motion by the attorney-general the cause was accordingly submitted on the record.

In the case of *People v. Young*, 38 Cal. App. 492, [176 Pac. 696], under a similar set of circumstances, the court held that it must be assumed that the appeal has been abandoned and the judgment should be affirmed for want of prosecution. (See, also, *People v. Wong Bow*, 38 Cal. App. 213, [175 Pac. 802]; *People v. Schiaffino*, 40 Cal. App. 675, [181 Pac. 813]; and *People v. Medaini*, 40 Cal. App. 676, [181 Pac. 673].)

[2] Notwithstanding the foregoing, we have carefully perused the pleadings, the evidence, and the instructions, together with the rulings of the court upon the admission and rejection of evidence, and are fully convinced that the defendant, after a fair and impartial trial, was justly convicted of the crime of statutory rape with which he was charged. No sufficiently prejudicial errors appear in the

record to warrant any interference with the action of the lower court.

The judgment is amended by striking out the words "for the term of not more than fifty (50) years, the exact term to be determined as provided by law," and, as so amended, the judgment and the order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 2936. First Appellate District, Division One.—October 24, 1919.]

J. L. SLATER, Appellant, v. J. J. RAUER et al.,
Respondents.

[1] AGENCY—AUTHORIZATION TO SELL REAL ESTATE—POWER TO BIND PRINCIPAL.—An instrument in writing headed "Authority to sell" and providing that a firm of real estate agents is "exclusively authorized to sell and receipt for a deposit on sale" of certain real property is not sufficient to empower the said firm to execute a contract for the sale of the property which would be binding upon the principal.

APPEAL from a judgment of the Superior Court of Alameda County. J. O. Moncur, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Watt, Miller, Thornton & Watt and Miller, Thornton, Miller & Watt for Appellant.

Harrison S. Robinson, Harry L. Price and R. W. MacDonald for Respondents.

RICHARDS, J.—This is an appeal by the plaintiff from a judgment in the defendants' favor after an order sustaining their demurrer to the plaintiff's amended complaint, the latter having declined to amend.

The action is one for the specific performance of a contract for the sale of real estate purporting to have been made with the plaintiff by a firm of real estate agents on

behalf of the defendant Rauer, claiming to act as such agents and having the right to make said contract of sale under an alleged authorization so to do executed by Rauer. The complaint sets forth the contract of sale and the alleged authorization *in haec verba*, and the only question for decision presented to the court upon appeal is as to whether said authorization was sufficient in its terms to empower the said agents to execute the contract of sale in question and to bind the defendants thereby to execute a conveyance to the plaintiff of the premises in question, the defendant Doyle having been given a conveyance of the property by Rauer after the execution and recordation of the aforesaid contract of sale.

[1] The authorization upon which the plaintiff relies is headed "Authority to sell" and is addressed to Pollard & Son, the firm of real estate agents who attempted to make the contract of sale by virtue of its terms. It states: "You are hereby exclusively authorized to sell and receipt for a deposit on sale of the following described property." Here follows the description. The authorization then proceeds to fix the price at which the property shall be sold at twenty thousand dollars, "or such lower figure as I may agree to accept," and then provides that the undersigned, J. J. Rauer, is "to furnish a good and sufficient conveyance free from all encumbrances."

The appellant contends that this authorization was sufficient to empower the said firm of Pollard & Son to execute the contract of sale of the premises described herein to him for the purchase price of twenty thousand dollars, and that he is entitled to have such contract of sale specifically performed by said Rauer and his subsequent transferee.

We cannot give our assent to this contention. The courts of this state have uniformly held ever since the early case of *Duffy v. Hobson*, 40 Cal. 240, [6 Am. Rep. 617], that the use of the words "authorized to sell" in a real estate agent's agreement does not authorize the agent holding the same to enter into a written contract of sale with a customer for the property described therein which would be binding upon the principal. (*Duffy v. Hobson*, *supra*; *Armstrong v. Lowe*, 76 Cal. 616, [18 Pac. 758]; *Stemler v. Bass*, 153 Cal. 791, [96 Pac. 809]; *Church v. Collins*, 18 Cal. App. 745, [124 Pac. 552]; *Salter v. Ives*, 171 Cal. 780,

[155 Pac. 84]; *Thompson v. Scholl*, 32 Cal. App. 4, [161 Pac. 1006].) It is, however, contended by the appellant herein that while the words "authorized to sell" might not of themselves convey power to the agents to execute a binding contract of sale, that these words may be aided by other phrases in the authorization so as to give this grant of power; and in this connection the appellant insists that the phrase in the document in question which entitled the real estate agents "to receipt for a deposit on sale" would work such extension of power. But certain of the cases deal with this precise question, holding that the inclusion of this clause in the authorization will not suffice to so extend its terms. In the cases of *Armstrong v. Lowe*, *supra*, *Church v. Collins*, *supra*, and *Thompson v. Scholl*, *supra*, this precise clause was incorporated in the several authorizations there under review, and in each of said cases it was held that the authority to execute a contract of sale binding upon the owner had not been conferred. In the case of *Church v. Collins*, *supra*, the court used the following language in regard to an agent's authorization fully as strong in its terms as the one under review in the instant case: "We are of the opinion that the agreement between the defendant and the real estate brokers conferred no authority upon the latter to execute a contract for the sale of the property involved here to the plaintiff or to any other party, and that therefore the court properly sustained the demurrer to the complaint. The rule deduced from the authorities with regard to the power or right of agents to execute contracts of sale of real property for the owners thereof is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such is its purpose."

The appellant directs our attention to the case of *Bacon v. Davis*, 9 Cal. App. 83, [98 Pac. 71], as enunciating a rule applicable to the case at bar. In that case the agents were authorized by the owner "to sell for me in my name" the property in question; and the court held these words sufficient to authorize the execution of a contract of sale. In the case of *Church v. Collins*, however, the ruling in the case of *Bacon v. Davis* was expressly called to the atten-

tion of the appellate tribunal, and that court therein distinguished that case from the case there at bar in the following words: "A comparison of the agreement in the case at bar with the one in the Bacon case will readily disclose a radical distinction between the two. Here there is no such authority given the brokers as is necessarily implied from the language in the Bacon agreement, 'to sell for me, in my name'—language that can import nothing short of an intention in the vendor to bestow upon his agent the right and the power to execute in his (the vendor's) name a contract to convey."

The same distinction was pointed out in the cases of *Stemler v. Bass*, *supra*, and *Thompson v. Scholl*, *supra*. In view of what seems to be a settled line of authority as set forth in the foregoing cases we are constrained to hold that the agents' authorization upon which the appellant relies in the instant case was not sufficiently ample in its grant of power to justify the agents holding the same in their attempt to execute a contract of sale with the plaintiff and appellant herein which would be binding upon their principal or his transferee. It follows that the judgment of the trial court must be affirmed. It is so ordered.

Kerrigan, J., and Beasley, P. J., *pro tem.*, concurred.

[Civ. No. 2861. First Appellate District, Division One.—October 24, 1919.]

F. L. STEWART, Appellant, v. HENRY P. BOWIE,
Respondent.

[1] **BROKERS' COMMISSIONS—NEGOTIATION OF SALE—WHEN COMMISSIONS EARNED—FAILURE OF PURCHASER TO PERFORM.**—Unless there is a provision in the contract to the contrary, a real estate broker, employed to negotiate a sale of land, earns his commission and it is payable when he produces, within the time allowed, a purchaser who is ready, willing, and able to take the property on

1. When commissions are earned, note, 139 *Am. St. Rep.* 225.
Right of real estate broker to commission where purchaser fails to comply with binding contract of sale, note, 11 *Ann. Cas.* 786.

the terms prescribed, or with whom the owner enters into a contract upon those or other terms satisfactory to him; and the broker cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or other terms of the contract not carried out.

- [2] **ID.—ABSENCE OF CONTRACT OF EMPLOYMENT—COMMISSIONS CONTINGENT UPON PERFORMANCE BY PURCHASER.**—Where there has been no previous contract of employment with the broker, and the owner's promise to pay him a commission is found only in a contract entered into between the owner and a prospective purchaser of the property, if the latter should fail to carry out his undertaking to purchase, the owner is released from his promise to pay the broker's commission. In such cases the broker, not having the protection of the ordinary broker's contract for compensation for services to be performed, must stand or fall by the contract actually entered into; and if he has seen fit to allow the payment of his compensation to be dependent upon the performance of a contract made between other parties than himself, he cannot complain if through the nonperformance of that contract his own contingent rights be lost.

- [3] **ID.—APPROVAL OF SALE AND PROMISE TO PAY BROKER—CONSTRUCTION OF CONTRACT.**—Where there was a valid employment of the broker with an agreement for his compensation, the production by the broker of a prospective purchaser within the time limit of his employment, although at a lower price than specified, and an acceptance by the owner of such prospective purchaser on modified terms by a valid contract in writing which, though somewhat ambiguous as to form, contained, first, a statement or report signed by the broker that it had sold the property on certain terms, detailing them, followed by a statement signed by the prospective purchaser that he agreed to buy the property upon the terms specified in said statement, adding that the sale was to be consummated in the office of the broker, and this being followed by an approval of sale and promise to pay the broker a stated sum on demand for its services, the owner, the prospective purchaser, and the broker were all parties to such contract, and the fact that the sale was not finally consummated by a transfer of the property did not affect the broker's rights.

APPEAL from a judgment of the Superior Court of San Mateo County. Geo. H. Buck, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Randolph V. Whiting for Appellant.

Arthur H. Redington for Respondent.

KERRIGAN, J.—This is an action to recover a commission on the sale of real estate. Judgment went for the defendant and plaintiff appeals.

Briefly, the facts of the case are these: On November 26, 1916, the defendant in writing appointed plaintiff's assignor, Lyon & Hoag, a corporation, his exclusive agent for the period of twenty days to sell his home, situate in San Mateo County, for eighty thousand dollars, said agent to receive a commission of five per cent in the event that it effected a sale under said authorization. On the following day the agent secured from one Ralston Wilbur an offer in writing to purchase said property for the sum of sixty thousand dollars, payable six thousand dollars cash in hand, and the balance in sixty days, or upon completion of the examination of title, the sale to be consummated in the office of the agent. This written offer was accepted by defendant by indorsing thereon the words: "I hereby approve the sale of the within described property, and agree to pay Lyon & Hoag on demand the sum of \$1,500 for their services." The defendant performed his part of the agreement, and also extended the purchaser's time a period of sixty days in which to make payment of said balance; the title to the property was good; a deed conveying it was duly prepared and was ready for tender and delivery to the vendee at the time and place appointed for the consummation of the transaction, but the vendee failed to perform his part of the agreement, and paid nothing further than the amount accompanying his offer to purchase.

[1] Unless there is a provision in the contract to the contrary, a real estate broker, employed to negotiate a sale of land, earns his commission and it is payable when he produces, within the time allowed, a purchaser who is ready, willing, and able to take the property on the terms prescribed, or with whom the owner enters into a contract upon those or other terms satisfactory to him, and the broker cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or other terms of the contract not carried out. (*Gunn v. Bank of California*, 99 Cal. 352, [33 Pac. 1105]; *Jauman v. McCusick*, 166 Cal. 522, [137 Pac. 254].) That such is the general rule in this state is not disputed by the respondent, but he urges that the appellant's assignor has

not brought himself within it for the reason that the promise of the defendant to pay the amount sued for, namely, one thousand five hundred dollars, was not made to the broker but to the proposed purchaser; and as the purchaser did not in fact complete his contract by taking and paying for the property, the defendant's promise to pay the commission cannot be enforced. [2] In making this contention the respondent relies upon a line of cases in which this court has held that where there has been no previous contract of employment with the broker, and the owner's promise to pay him a commission is found only in a contract entered into between the owner and a prospective purchaser of the property, if the latter should fail to carry out his undertaking to purchase, the owner is released from his promise to pay the broker's commission. (*Jennings v. Jordan*, 31 Cal. App. 335, [160 Pac. 576]; *Brion v. Cahill*, 34 Cal. App. 258, [165 Pac. 704].) In such cases the broker, not having the protection of the ordinary broker's contract for compensation for services to be performed, must stand or fall by the contract actually entered into; and if he has seen fit to allow the payment of his compensation to be dependent upon the performance of a contract made between other parties than himself, he cannot complain if through the nonperformance of that contract his own contingent rights be lost. [3] The facts of the present case, however, bring it within the general rule above announced as to the right of a broker to his commission. There was a valid employment of the broker with an agreement for his compensation; the production by the broker of a prospective purchaser within the time limit of his employment, although at a lower price than specified, and an acceptance by the owner of such prospective purchaser on modified terms by a valid contract in writing. This contract as to its form is somewhat ambiguous. It contains, first, a statement or report signed by the broker that it has sold the defendant's property on certain terms, detailing them, to Ralston Wilbur; this is followed by a statement signed by Wilbur that he agrees to buy the property upon the terms specified in said statement or report, adding, however, that the sale is to be consummated in the office of the broker; underneath this appears the following, signed by the defendant: "I hereby approve

sale of the within described property, and agree to pay Lyon & Hoag on demand the sum of \$1,500 for their services." We think it very questionable whether this writing can be construed as an agreement exclusively between the defendant and Wilbur. The major part of it is contained over the signature of the broker; and if the promise of the defendant therein contained: "I . . . agree to pay Lyon & Hoag on demand the sum of \$1,500 for their services," is to be construed merely as a promise made to Wilbur, and not as being also addressed to the broker, it leaves the defendant in this dilemma: That his original agreement with the broker is unmodified, and instead of being liable to pay him one thousand five hundred dollars, his liability is measured by his original authorization, under which it would amount to the sum of three thousand dollars, being five per cent on sixty thousand dollars. We think that the reasonable construction of the writing in question is that the owner, the prospective purchaser, and the broker were all parties to it, their respective obligations and rights being easily discoverable therefrom. The defendant's promise to pay the broker one thousand five hundred dollars was addressed to Lyon & Hoag, and his approval of the sale constituted an acceptance of the offer made by Wilbur. Thus construed, the defendant acknowledges his liability to pay the broker the sum of one thousand five hundred dollars; and the fact that the sale was not finally consummated by a transfer of the defendant's property cannot be held to affect the broker's rights.

It follows from what we have said that the court was in error in denying the plaintiff's motion for a new trial and in rendering judgment in favor of the defendant.

The judgment is therefore reversed.

Richards, J., and Waste, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 22, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2894. First Appellate District, Division Two.—October 24, 1919.]

**PAULINE VARROIS, Appellant, v. MARIE GOMMET,
as Executrix, etc., et al., Respondents.**

- [1] **TRUSTS—VOLUNTARY TRUSTS—REPUDIATION OF—STATUTE OF LIMITATIONS.**—In the case of a voluntary express trust where the estate is to be managed for the benefit of the trustor to be returned on demand, the statute of limitations does not begin to run until after a repudiation of the trust. The same rule is applicable to voluntary resulting trusts.
- [2] **ID.—INVOLUNTARY IMPLIED TRUSTS—REPUDIATION UNNECESSARY.**—In the case of an involuntary implied trust raised by operation of law no repudiation of the trust is necessary to start the running of the statute of limitations.
- [3] **ID.—ACTION TO ENFORCE—NATURE OF TRUST ALLEGED.**—In this action for a judgment decreeing that certain real estate and personal property was the property of plaintiff and held by defendant in trust for plaintiff, for the transfer of such property to the plaintiff, and for an accounting, the pleader alleged facts showing an express voluntary trust arising out of the confidential relations existing between the parties, the repudiation of which was necessary to start the running of the statute of limitations.
- [4] **ID.—PROHIBITED TRUSTS—CONSTRUCTION OF SECTIONS 724 AND 857, CIVIL CODE.**—Such trust, in providing for accumulations after minority and permitting the conveyance of real property, was not void under sections 724 and 857 of the Civil Code. Section 724 of the Civil Code is a limitation upon the power to create future interests by will or transfer in writing, but has no application to the deposit of money with an adult to be invested for the use and benefit of the owner, while section 857 relates only to the creation of a trust for the benefit of a third person.
- [5] **ID.—TRUST TO RECEIVE AND HOLD PROPERTY.**—A trust to receive and hold real property to be transferred to the trustor on demand is not a trust to convey within the meaning of *Estate of Fair*, 132 Cal. 523.
- [6] **ID.—LACHES—DEMURRER.**—It is only when laches affirmatively appears on the face of the complaint that this defense can be raised by demurrer.

1. Application of statute of limitations as between trustee and beneficiary of express trust, notes, 3 Ann. Cas. 200; 13 Ann. Cas. 1165; Ann. Cas. 1917C, 1018.

[7] **ID.—ACTION TO ENFORCE—LACHES.**—Where suit to enforce an express voluntary trust is commenced within less than two months after the rejection of demand upon the executrix of the estate of the deceased trustee and within three days after rejection of demand by the surviving trustee, this does not constitute such delay as would warrant the court in holding that the plaintiff was guilty of laches in the institution of the proceedings.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Reversed.

The facts are stated in the opinion of the court.

James P. Sweeney and Frank J. Fontes for Appellant.

H. U. Brandenstein for Respondents.

NOURSE, J.—Plaintiff sued Marie Gommet individually and as executrix of the estate of Fleury Gommet for a judgment decreeing that certain real and personal property was the property of plaintiff and held by said defendant in trust for plaintiff, for the transfer of such property to the plaintiff, and for an accounting. Three banks were joined as defendants upon allegations that they held moneys of the plaintiff which were deposited with them by the Gommets for the use and benefit of the plaintiff. No appearance was made for them. A demurrer, both general and special in form, was interposed to the amended complaint on behalf of the defendant Gommet individually and as such executrix. This demurrer having been sustained without leave to amend, judgment was rendered in favor of defendant and this appeal followed.

Appellant argues upon all the grounds raised by the demurrer, but respondent relies solely upon the grounds that plaintiff's action is barred by the statute of limitations and by her laches. As to the other grounds of demurrer it is sufficient to say that they are without merit, and no discussion need be had as to them because abandoned by respondent upon this appeal.

The issue upon this appeal is, does the amended complaint, being confessed by the demurrer, present a cause of

7. Laches which will defeat relief after repudiation of express trust, note, 5 L. B. A. (N. S.) 986.

action which upon its face is not barred by the statute of limitations or by the laches of plaintiff.

The allegations of the amended complaint are that plaintiff came to San Francisco from a foreign country when but seventeen years of age and took up her abode with her elder sister, the defendant Marie Gommet; that about the twentieth day of December, 1900, plaintiff entered into an agreement with Marie Gommet and Fleury Gommet, her husband, whereby they agreed to accept and receive all moneys deposited with them in trust by plaintiff, to be invested, managed, and controlled by them for the use and benefit of plaintiff until the same might be demanded by her. It is also alleged that by this agreement said defendants were to invest such part of said moneys in real estate as they might deem proper, and to transfer the same to plaintiff on demand, together with the rents, issues, and profits. A description is given of the real and personal property alleged to have been purchased with money so given them by plaintiff from time to time from 1900 to 1906, which are alleged to have totaled the sum of fifty-four thousand dollars. Fleury Gommet died March 31, 1917. Marie Gommet duly qualified as executrix of his estate, and within time thereafter plaintiff presented her claim to such executrix and demanded the transfer of all the property so alleged to be held in trust for her, and soon thereafter made similar demand upon Marie Gommet individually. Both demands were rejected, and thereupon for the first time plaintiff had knowledge of the repudiation of the alleged trust. The action was instituted immediately after the rejection of the last demand.

Respondent argues that her plea of the bar of the statute was good, because (1) where a demand is necessary to set the statute of limitations running, the demand must be made within the time prescribed for the commencement of the action upon the original obligation; and (2) that the alleged trust was an express trust of the type forbidden by the law of this state, and being invalid, gave rise to an implied trust against which the statute began to run immediately without demand and without repudiation.

[1] Generally speaking, respondent's position as to the time when demand must be made is correct, but in the case of a voluntary express trust where the estate is to be

managed for the benefit of the trustor to be returned on demand, the statute of limitations does not begin to run until after a repudiation of the trust. (*Schroeder v. Jahns*, 27 Cal. 274, 280; *MacMullan v. Kelly*, 19 Cal. App. 700, 706, [127 Pac. 819]; *Norton v. Bassett*, 154 Cal. 411, 419, [129 Am. St. Rep. 162, 97 Pac. 894]; *Arnold v. Loomis*, 170 Cal. 95, 98, [148 Pac. 518]; *Hughes v. Silva*, 42 Cal. App. 785, [184 Pac. 415].) The same rule is applicable to actions to enforce a voluntary resulting trust. (*Roach v. Caraffa*, 85 Cal. 436, 446, [25 Pac. 22]; *Faylor v. Faylor*, 136 Cal. 92, 96, [68 Pac. 482]; *Arnold v. Loomis*, *supra*.)

[2] It is true, as urged by respondent, that in the case of an involuntary implied trust raised by operation of law no repudiation of the trust is necessary to start the running of the statute of limitations. (*Benoist v. Benoist*, 178 Cal. 234, [172 Pac. 1109]; *Earhart v. Churchill Co.*, 169 Cal. 728, 731, [147 Pac. 942].)

[3] It becomes important, then, to determine the character of the trust here involved. If it was an involuntary implied trust, then under the authorities last cited respondent's plea of the bar of the statute was good and the judgment of the trial court must be affirmed. On the other hand, if it was a voluntary express or resulting trust, the statute did not commence to run until after repudiation. It is alleged that the moneys were given to the trustees "to invest, loan out, care for, manage and control said moneys so deposited by plaintiff with them, or either of them, for the use and benefit of said plaintiff, until the same might be demanded by said plaintiff; to invest such part of said moneys in real estate for plaintiff as in the judgment of said Fleury Gomet, now deceased, and said Marie Gomet, seemed for the best interests of said plaintiff, and to transfer said real estate so acquired by said Fleury Gomet, now deceased, and said Marie Gomet, or either of them, to said plaintiff on demand of said plaintiff, together with all rents, issues, and profits thereof; to lend such part of said moneys as in the judgment of said Fleury Gomet, now deceased, and said Marie Gomet, seemed for the best interests of this plaintiff at interest and to take good security therefor; to transfer all evidences of such loans and securities to said plaintiff on said plaintiff's demand; and to hold such balance of said moneys as had

not been previously invested or loaned to the order of this plaintiff, for the use and benefit of said plaintiff, until demanded by plaintiff." Also "that it was the agreement and intention of plaintiff and said Fleury Gommet, during his lifetime, and Marie Gommet, that said defendant Marie Gommet and said Fleury Gommet should hold and continue to hold said property during all of said times for the use and benefit of plaintiff, in order that the same might be increased by accumulations of interest, rents, issues, and profits; that plaintiff always believed that said property would be delivered and transferred to her upon her request or demand, and was so told and assured by said Fleury Gommet on many occasions during his lifetime and up to the time of his death, and also by her said sister the defendant Marie Gommet."

From these allegations it is apparent that the pleader alleged an express voluntary trust arising out of the confidential relations existing between the parties. [4] But respondent argues that, as the trust provided for accumulations after minority and permitted the conveyance of real property, it was void as an express trust under sections 724 and 857 of the Civil Code prohibiting trusts for accumulations beyond minority and trusts to convey realty. From this it is argued that it must be treated as an implied trust only. But section 724 is a limitation upon the power to create future interests by will or transfer in writing. It has no application to the deposit of money with an adult to be invested for the use and benefit of the owner, while section 857 relates only to the creation of a trust for the benefit of a third person. [5] Furthermore, a trust to receive and hold real property to be transferred to the trustor on demand is not a trust to convey within the meaning of the *Estate of Fair*, 132 Cal. 523, [84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000]. If, as alleged in the amended complaint, real property was purchased by the trustees with the money of appellant, then, in the absence of any other specific agreement, a trust resulted under the terms of section 853 of the Civil Code. Such a trust is valid as one created or declared by operation of law. (Civ. Code, sec. 853.) A trust so created or declared becomes a voluntary trust as to the trustee "by any words or acts of his indicating, with reasonable certainty: 1. His accept-

ance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence." (Civ. Code, sec. 2222.)

The complaint alleges both acceptance and acknowledgment on the part of both trustees, the continuance of the confidential relations between the parties, and the promises to turn over the property to appellant, made up to the time of the death of the trustee Fleury Gommet. There is thus pleaded an express trust created by the original agreement, with the possibility of a resulting trust so far as the realty is concerned growing out of the trustees' own acts in purchasing the realty with the funds of the trustor. In either event, a voluntary continuing trust was created, against which the statute would not commence to run until a repudiation of the trust on the part of the trustees was brought to the knowledge of the trustor. (*Arnold v. Loomis*, 170 Cal. 95, 98, [148 Pac. 518]; *Taylor v. Morris*, 163 Cal. 717, 725, [127 Pac. 66]; *Roach v. Caraffa*, 85 Cal. 436, 446, [25 Pac. 22].) In the latter case the supreme court say: "If, now, it affects any real estate, as it presently appears to do, it has been made to do so because of the act of the trustee, and by operation of law under sections 852 and 853 of the Civil Code; but this does not change its character of express trust. A resulting trust, under section 853, may still be an express trust. It was not alone an express trust, but a continuing trust, and the statute of limitations would not run against the *cestui que trust*, until repudiation by trustee brought home to the knowledge of the beneficiary." This is clearly the rule of law in this state, and further citation of authority is unnecessary.

Respondent next urges that the action is barred by the laches of appellant. The facts alleged are that at all the times during the continuance of the trust both trustees reaffirmed their obligations and promised to return the property on demand; that their relations were friendly and cordial, and appellant had no reason to anticipate that there would be a repudiation on the part of either trustee until she filed her claim against the estate of Fleury Gommet. The action was commenced within a few months after the rejection of this demand. [6] It is only when laches affirmatively appears on the face of a complaint that this

defense can be raised by demurrer. [7] The demand upon the executrix was rejected on August 22, 1917. The demand made upon the respondent individually was rejected October 15, 1917. This suit was instituted October 18, 1917. This does not constitute such delay as would warrant the court in holding that the plaintiff was guilty of laches in the institution of the proceedings. (*Lamb v. Lamb*, 171 Cal. 577, [153 Pac. 913]; *Cooney v. Glynn*, 157 Cal. 583, 589, [108 Pac. 506]; *Hughes v. Silva*, 42 Cal. App. 785, [184 Pac. 415].)

For the reasons given the judgment is reversed, with directions to the trial court to overrule the demurrer and to grant leave to the respondent to answer the amended complaint.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 22, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Crim. No. 481. Third Appellate District.—October 24, 1919.]

THE PEOPLE, Respondent, v. ELTON FRAZIER,
Appellant.

[1] CRIMINAL LAW—EXTORTION—JUDGMENT—APPEAL—EVIDENCE. — On appeal from the judgment of conviction in this prosecution for the crime of extortion, abundant evidence was found in the record to support the verdict, no prejudicial error was discovered, and no reason appeared why the conclusion reached in the trial court should be disturbed.

APPEAL from a judgment of the Superior Court of Plumas County. J. O. Moncur, Judge. Affirmed.

The facts are stated in *People v. Peck*, ante, p. 638.

M. C. Kerr for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

THE COURT.—This is a companion case to *People v. Peck, ante*, p. 638, [185 Pac. 881]. [1] On a separate trial this defendant was convicted and sentenced to the penitentiary for an indeterminate period. The appeal is from said judgment. No argument, either oral or written, has been submitted in this court in behalf of appellant. His counsel appeared at the time set for the hearing, but declined to make any argument. We have, nevertheless, examined the record and have found abundant evidence to support the verdict. It may be stated further that we have discovered no prejudicial error, and we know of no reason why we should disturb the conclusion reached in the trial court.

The judgment is affirmed.

[Civ. No. 1959. Third Appellate District.—October 24, 1919.]

STANDARD AUTO SALES CO., INC. (a Corporation),
Appellant, v. **CHARLES LEHMAN**, Respondent.

- [1] **LIENS—MORTGAGES—OWNER AS MORTGAGEE.**—A party cannot hold a mortgage on and the legal title to the same property at the same time.
- [2] **ID.—HYPOTHECATION — TITLE IN ANOTHER.**—A person cannot hypothecate property where the title is in another.
- [3] **ID.—DELIVERY OF AUTOMOBILE TO VENDEE—LIEN FOR PURCHASE PRICE.**—Where the vendor of an automobile retains title in himself, the possession of the machine being delivered to the vendee, he does not have a lien thereon for the unpaid balance of the purchase price.
- [4] **ID.—PLEDGE—VENDOR NOT IN POSSESSION.**—Such vendor was not secured by a pledge of said property. In order to have such security he must have been the pledgee and in possession of the property.
- [5] **ATTACHMENTS—SALE OF AUTOMOBILE—RETENTION OF TITLE—ACTION FOR PURCHASE PRICE—RIGHT TO ATTACHMENT.**—The vendor of an automobile under an installment contract, the possession of the machine being delivered to the vendee, in an action for the unpaid balance of the purchase price, is entitled to a writ of attachment under subdivision 1 of section 537 of the Code of Civil Procedure, where possession of the machine is not retaken, notwithstanding that the title to the machine is retained in himself.

[6] **ID.—CONSTRUCTION OF ATTACHMENT STATUTES.**—Statutes permitting and providing for the levying of attachments must be strictly construed and followed. When the law designates and specifies in what instances an attachment may issue and in what cases it is not a legal remedy, the express will of the legislature must control.

APPEAL from an order of the Superior Court of Sacramento County dissolving an attachment. Charles O. Busick, Judge. Reversed.

The facts are stated in the opinion of the court.

Max J. Kuhl for Appellant.

White, Miller, Needham & Harber for Respondent.

BURNETT, J.—The action was brought on a written contract for the sale and purchase of an automobile for the sum of \$950, \$150 to be paid by the defendant at the time of signing the contract, and the balance in certain definite monthly installments. Possession of the machine was delivered to the defendant, but it was provided in the contract that the title was to remain in the plaintiff until all the installments were paid. Paragraph 6 of said contract, which constitutes the basis of this action, reads as follows: "Should the buyer make default in the payment of the said purchase price, or any part thereof, or in the event of the buyer's failure to perform any of the conditions and covenants herein contained, or to pay the cost of said insurance on demand, the seller or assigns may, without notice, declare any and all payments provided for herein to be due and payable at once, and may immediately take possession of said property, whenever found, without process of law, using all necessary force to do so, and retain the same, and all payments previously made by the buyer shall be construed to be and applied as compensation for depreciation in value, and for the use of said property, and the buyer hereby waives and relinquishes all rights to the moneys so paid, and to the said property."

To the complaint, and made a part thereof, was attached said contract. It was alleged that the defendant failed to pay certain of the installments as they fell due, and that \$650 of the purchase price remained due and unpaid from the defendant to the plaintiff, and that the plaintiff had

complied with all the terms of the contract as it had agreed. The action was brought for the balance of the purchase price, and not for the return of the automobile. An attachment was issued in behalf of plaintiff and levied upon the bank account of the defendant. All the proceedings in reference to the issuance and levying of the attachment were in regular form and in accordance with the requirements of sections 537 and 538 of the Code of Civil Procedure. The defendant made a motion to dissolve the attachment upon the ground that it was shown by the complaint and contract on file in said action that the debt was *secured by a mortgage or lien or pledge of personal property*, and that such security had not become valueless and that no proceedings had been taken to exhaust said security. Affidavits were filed in support thereof, and thereupon the motion was granted, and from the order dissolving the attachment the plaintiff has appealed. The only question in the case is whether it falls within subdivision 1 of said section 537, providing that attachment may issue "in an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." And the only doubt as to the application of said section is whether plaintiff's contract was secured by "any mortgage or lien upon real or personal property or any pledge of personal property." It is admitted that the action is brought upon a contract made payable in this state for the direct payment of money, but it is claimed by respondent that the plaintiff, by reason of the fact that it retained title to the property and had the right to retake it in case of default on the part of defendant in the payment of any of the installments, had security within the contemplation of said section of the code and, therefore, attachment was not a proper remedy.

In the determination of the question it is important to notice carefully the precise terms used in the statute. The law does not provide that no attachment shall issue where the plaintiff has other *security* for the claim, but it

designates the specific kinds of security that will bar the remedy, namely: A mortgage, a lien or a pledge of the property. As to the mortgage, it is quite apparent from the definition of that term in the code that plaintiff had no such security. By the terms of the contract the plaintiff remained the owner of the property, and this necessarily precludes the condition that it could be a mortgagee. [1] A party cannot hold a mortgage on and the legal title to the same property at the same time. A mortgage is defined by the Civil Code, section 2920, as follows: "Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." In other words, for plaintiff to be the mortgagee of the property it must have been hypothecated to it by the defendant, but this could not be, since defendant was not the owner. [2] A person cannot hypothecate property where the title is in another.

[3] The question then arises whether the plaintiff, under the terms of the contract, had a *lien* to secure the payment of the obligation. As to this it seems to be plain under the law that a vendor's lien does not exist as to personal property, independent of possession. There is no controversy that the defendant at the time of the action had, and ever since the execution of the contract has had, possession of the machine. Therefore, since by the law a lien does not exist independent of possession it would follow, necessarily, that plaintiff did not have that kind of security. Section 3049 of the Civil Code provides as follows: "One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price." If his lien depends upon his possession, manifestly the lien would not exist if the possession were in another. Besides, the existence of a lien and ownership as to the same property in the same party at the same time is not in accordance with the legal conception of these terms. A person cannot have a lien upon personal property of which he is the owner. A lien is a charge upon specific property which the holder thereof is entitled to enforce as a security for the performance of an obligation, which exists in his favor *against* the owner of the property. (Civ.

Code, sec. 2874.) It would seem plain, therefore, that plaintiff did not have a lien, as that term is understood in the law, upon said automobile.

[4] It seems equally plain that plaintiff was not secured by a *pledge* of said property. In order to have such security he must have been the pledgee and in possession of the property. Section 2988 of the Civil Code provides: "The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder, as hereafter prescribed."

[5] If we are, therefore, to be guided by the plain meaning of the statute, it would follow that plaintiff was entitled to the writ of attachment. The only ground upon which this conclusion could be avoided would be that the said statute contemplates other security as well as those which are specifically mentioned. This position would, however, be in contravention of a familiar principle for the interpretation of statutes, which from the enumerated specification of certain particular ones requires the exclusion of the consideration of other classes. In other words, the statute having specified the three particular kinds of securities, to wit; mortgage, lien, and pledge, by implication there would be excluded any other species. Indeed, we think that the lower court, in holding that this was not a proper case for attachment, has gone outside the plain and simple meaning of the statute. In doing so, it had apparently the support of certain decisions of the courts to which specific reference will hereafter be made. [6] But it seems to be well settled that the statutes permitting and providing for the levying of attachments must be strictly construed and followed. (*Kline v. Easton, Eldridge & Co.*, 148 Cal. 287, [113 Am. St. Rep. 253, 83 Pac. 36].) When the law, therefore, designates and specifies in what instances an attachment may issue and in what cases it is not a legal remedy, the express will of the legislature must control.

As to the cases cited we think *Eads v. Kessler*, 121 Cal. 244, [53 Pac. 656], is most nearly in point. In that case the plaintiff agreed to sell defendant an interest in certain patent rights, the purchase price to be paid in installments, the plaintiff to give the defendant a conveyance of the patent right when the purchase price was paid in full. The defendant did not pay one installment when it fell due and

the plaintiff sued and levied an attachment. The defendant contended that the writ of attachment was improperly issued and should be discharged because the plaintiff had a vendor's lien upon the patent to secure the payment of the money sued for. In holding that the attachment was proper, the court said: "It should be observed that the existence of a vendor's lien always presupposes that title to the goods has passed to the vendee since it would be an incongruous conception that the vendor might have a lien upon its own goods." The court therein quotes section 119 of Tiedeman on Sales, as follows: "In order that the vendor of goods may claim a lien on the goods they must have or become the property of the vendee, for one cannot have a lien on goods belonging to himself. . . . The only cases in which a vendor can have a lien on goods are those on which the title to the goods passes to the vendee without delivery or possession." It is true that the immediate question decided in that case was as to whether or not the plaintiff had a vendor's lien on personal property to which he had not passed title, still the facts of the case were very similar to those herein, and it would seem that the decision would have been different if the court had believed that the plaintiff had any security, as provided by said section of the code. It may not be amiss to specify the points of agreement between that case and this. In both cases the plaintiff sold personal property to the defendant. In both cases title remained in the plaintiff until the purchase price should be paid. In both cases the purchase money was not paid and an action was brought to enforce payment and an attachment levied on the property of defendant. In both cases the defendant objected to the attachment on the ground that plaintiff had security for the payment of his obligation. In the Eads case the particular contention was that the plaintiff had a vendor's lien, whereas, in this case the defendant has not specified the nature of the security; although from his argument it is a reasonable inference that he claims that plaintiff had a security in the nature of a mortgage. It would, indeed, appear that it could with greater reason in that case than in this be concluded that plaintiff had security for his claim, since he retained possession of the property which was the subject of the executory sale.

The particular decision in this state upon which respondent relies is *Payne v. Bensley*, 8 Cal. 260, [68 Am. Dec. 318]. In that case the court stated that "the only question in this case is whether a negotiable promissory note, not yet due, and *bona fide* taken as collateral security for pre-existing debt, is subject, in the hands of the endorsee, to any defense existing at the date of the assignment, between the original parties." But in the determination of this question was involved the consideration for said assignment, and plaintiff, in support of his contention that there was a new consideration for said assignment of the note of Bensley as collateral security for the pre-existing debt, contended that before the assignment he had a remedy by attachment against his debtor, but by taking the collateral security he lost that remedy, and that the loss of this remedy constituted a new consideration, moving from Payne to his debtor, the assignee of the note. This case was decided in the year 1857, and the statute governing attachment at that time (section 120 of the Practice Act [Stats. 1851, p. 68]), provided that the remedy of attachment did not exist where the contract was secured by a mortgage on real or personal property. The statute did not then make any provision in reference to a pledge, but the reasoning of the court is to the effect that since a mortgage is a mere security for a debt, the term was broad enough to include a pledge, which is "essentially the same, and intended to accomplish the same end." The conclusion was based upon the assumption that the "intention of the legislature was to use the word 'mortgage,' as applicable to personal property in its widest instance." In that case, it is to be observed that there was actually a pledge of personal property. Hence, the assignment had the effect of giving the plaintiff security. It is true that the statute in force at that time did not specifically mention such security, but a short time after the decision said section 120 of the Practice Act was amended so as to include a pledge. Applying the law that exists now to the facts of that case we would have to reach the same conclusion, although, we think the law was very liberally construed by the distinguished jurist who wrote the opinion in the Payne case, and his associates, in order to affirm a judgment that was manifestly just and equitable. But in the present instance it cannot

be said, as we have already seen, that there was a pledge of said personal property. The decision, therefore, that the term "mortgage" in the statute was broad enough to include the term "pledge" would not justify a decision in favor of defendant in this case, since there was neither a mortgage nor a pledge. Respondent has also called attention to two decisions by the supreme court of Idaho, which seem to support his contention. The first is *Mark Means Transfer Co. v. Mackinzie*, 9 Idaho, 165, [73 Pac. 135], and the second *Barton v. Groseclose*, 11 Idaho, 227, [81 Pac. 623]. They are both to the effect that "one who makes conditional sale of personal property, delivering possession to the vendee, and retaining the title thereto himself until the purchase price shall be fully paid, cannot, upon failure of the purchaser to make the payments, have an attachment against the property of the purchaser to secure the payment of the purchase price until the property itself has been exhausted." It was held in those cases that the security was neither a mortgage, lien, nor pledge, but that it was a higher class of security than either, and that the statutes of Idaho contemplated such security as grew out of the condition wherein the vendor retained title in the property until the entire purchase price was paid. It is to be observed, however, that the language of the Idaho statute is somewhat different from ours in that it makes it necessary to show, referring to the contract sued upon, "that the payment of the same has not been secured by any mortgage or lien upon real or personal property or any pledge of personal property, or if *originally secured*, that such security has without any act of the plaintiff become valueless," while our statute is identical with that except the corresponding phrase is "*originally so secured*." The expression used in the Idaho statute might very properly be construed as enlarging the instances previously enumerated, so as to include any kind of security, whereas the corresponding phrase in the California statute clearly refers and limits the application of the law to the three kinds of securities specifically mentioned. Respondent also argues that the rule must be the same in an executory contract for the sale of real property and for the sale of personal property. And since it has been held that in the former instance an attachment will not issue, that, therefore,

the same rule must apply in the latter instance. But we think there is a clear distinction between the two; for instance, where a vendor sells real property and conveys the title and gives up possession he has a vendor's lien upon the property for the payment of the purchase price. But in a similar situation as to personal property there is no vendor's lien, since the vendor has surrendered possession. It is true, also, that in an executory contract for the sale of real property where the title has not passed it has been held that the vendor has security in the nature of an equitable mortgage for the payment of the balance of the purchase price and, therefore, that he is not entitled to the remedy by attachment. (*Richvale Land Co. v. Johnson*, 28 Cal. App. 296, [152 Pac. 312].) The ground upon which that decision is based and also *Gessner v. Palmateer*, 89 Cal. 89, [13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789], cited therein, is that the "transaction shows upon its face that the vendor held the legal title as security" and that the vendee cannot prejudice that title or in any way divest it except by performance of the act for which the vendor holds it. The difference, however, between the two kinds of property is the reason for the difference in the rule applicable to each. Real property is fixed and cannot be destroyed, lost, stolen, or taken away. And the vendor, therefore, always has his security for the payment of the balance of the purchase price. While personal property, as the automobile in the present case, may be taken away or stolen or destroyed with the consequent loss of his security and without the knowledge of the vendor. Of course, if the seller had retained possession of the automobile and passed title, there would have been a lien upon the property. But retaining the title under the executory contract of sale and passing possession, plaintiff has neither a lien nor a mortgage as security, but only the bare legal title and the buyer's promise to pay.

We do not see how it can be held, without judicial legislation, by introducing something into the statute which is not contained therein, that the decision can be sustained.

The order is, therefore, reversed.

Ellison, P. J., *pro tem.*, and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 22, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 8071. First Appellate District, Division One.—October 25, 1919.]

HARRIETT WHITE WEBSTER, Appellant, v. DANIEL WEBSTER, Respondent.

- [1] **DIVORCE—GRANTING OF ALIMONY, COUNSEL FEES, AND COSTS—DISCRETION OF TRIAL COURT.**—The granting of alimony, counsel fees, and costs in actions for divorce is a matter which lies largely in the discretion of the trial court, and it must be made to clearly and affirmatively appear upon the face of the entire record in the case that this discretion has been abused before the appellate tribunal will be moved to interfere.
- [2] **ID.—DENIAL OF ALIMONY—APPEAL—ABUSE OF DISCRETION.**—Upon this appeal from the portion of a judgment of divorce, on the grounds of extreme cruelty and failure to provide, refusing to allow the plaintiff alimony, the appeal having been taken on the judgment-roll alone, the appellate court could not say from the record before it that the trial court abused its discretion.

APPEAL from a judgment of the Superior Court of Lake County. M. S. Sayre, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. B. Churchill and Ogden & Ogden for Appellant.

C. M. Crawford for Respondent.

RICHARDS, J.—This is an appeal by the plaintiff in an action for divorce wherein she was granted a divorce from the defendant on the ground of cruelty and failure to provide, but was denied alimony. The appeal is upon the judgment-roll, and the sole contention of the appellant is that the findings of the trial court do not support that

portion of the judgment which refuses to allow the plaintiff alimony.

The findings are to the effect that the defendant was guilty of the specific acts of cruelty set forth in the complaint as a ground of divorce, and also that the defendant, while able so to do, has been guilty of failure to provide; that the plaintiff is without means of self-support; that the defendant is the owner of certain separate real property of the value of four thousand dollars, upon which there is an indebtedness of one thousand eight hundred dollars, secured by a trust deed; that the defendant has also certain miscellaneous separate personal property in the way of farm produce, implements, and animals of the value of about six hundred dollars, and is indebted in store accounts to the extent of about one thousand five hundred dollars; that the plaintiff has no interest in any part of said property; that during the trial of the action the defendant paid to the plaintiff on motions for alimony the sum of \$150; that the plaintiff has no means whatever and is physically unable to earn her own livelihood and maintenance, and has incurred obligations during the trial of the action for board and for counsel fees and costs which she is unable to pay. Notwithstanding these findings of fact the court refused to allow the plaintiff either permanent alimony or counsel fees or costs, and it is the appellant's contention herein that it was an abuse of discretion on the part of the trial court to so refuse the plaintiff this relief while granting her a divorce on the grounds of the defendant's cruelty and failure to provide.

This appeal is before us on the judgment-roll alone, and it is so by the plaintiff's choice. The evidence educed before the trial court is not before us, and it has been omitted from this record also by the plaintiff's choice. The defendant had no selection nor any way of adding to this record the evidence in the case, even had he desired so to do. We are therefore left entirely in the dark as to the causes as they might have been disclosed by the evidence which moved the trial court to refuse to allow the plaintiff either alimony, counsel fees, or costs while granting her prayer for divorce.

[1] The granting of these incidental forms of relief in actions for divorce is a matter which lies largely in the

discretion of the trial court, and it must be made to clearly and affirmatively appear upon the face of the entire record in the case that this discretion has been abused before the appellate tribunal will be moved to interfere. [2] Such a record is not before us, but from the admissions in the pleadings and the findings in the case certain facts appear which may serve to indicate that a state of things might have been shown in the evidence which must have justified the trial court in severing the marriage relation between the parties hereto without further relief to either. The parties were married in the month of July, 1914; this action for divorce was commenced on August 10, 1917. Both of the parties had been married before and both had children by such prior marriages. The family troubles of the pair began shortly after their union, and were apparently stormy during the brief period of its continuance. Much of these troubles grew out of the bringing together of these two sets of children in the same household, if we are to accept the plaintiff's own recital of the causes of these family discords.

These fleeting glimpses of the case may well serve to indicate a state of the evidence on its trial which would have fully justified the action of the trial court in refusing to the plaintiff any further relief than that of the temporary alimony awarded her and the bare decree of divorce. This being so, we are constrained to hold that a sufficient showing of abuse of discretion in this regard has not been made by this appeal upon the judgment-roll alone.

Judgment affirmed.

Kerrigan, J., and Beasley, P. J., *pro tem.*, concurred.

[Civ. No. 3066. First Appellate District, Division One.—October 25, 1919.]

MARIA DA GLORIA BARBOZA, Appellant, v. **CONSELHO SUPREMO DA IRMANDADE DO DIVINO ESPIRITO SANTO DO ESTADO DA CALIFORNIA** (a Corporation), Defendant; **AMELIA FARIA et al.**, Respondents.

- [1] **MUTUAL BENEFIT SOCIETY—CHANGE OF BENEFICIARY—COMPLIANCE WITH LAWS.**—Where the by-laws or constitution of a mutual benefit society provide a method for making a change of beneficiary, a member in making a change must follow substantially the method prescribed; and he may change his beneficiary and name a new beneficiary whenever and as often as he pleases, provided he follows the steps required by the society's rules on the subject.
- [2] **ID.—EXCEPTIONS TO RULE.**—The rule that a member of a mutual benefit society must follow substantially the method prescribed in the by-laws or constitution in order to make a change of beneficiary has three recognized exceptions, namely: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of an insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course laid down in the society's rules was not pursued; (2) If it is beyond the power of the insured to comply literally with the regulations, a competent court will treat the change as having been legally made; (3) If the insured has pursued the course pointed out by the laws of the association, and has thus done everything devolving upon him to change the beneficiary, but before the new certificate issues he dies, a court of equity will decree that to be done which ought to have been done, and act as though the certificate had been issued.
- [3] **ID.—LOSS OF POLICY—NONCOMPLIANCE WITH LAWS.**—Where the laws of a mutual benefit society provide that a member may change beneficiaries "by making the change on the back of the policy or a duplicate thereof," and if the policy has been lost or destroyed, in order to obtain a duplicate he must make an affidavit for that purpose, and that before a duplicate policy can be issued the supreme directors "must give their permission and approval to the supreme secretary to issue a duplicate policy," and further provide that when the change of beneficiaries has been properly indorsed upon the back of the original policy the same must be filed with a designated body for approval or rejection, the filing of an affidavit showing the loss of the original policy and the making of

an order that a duplicate issue does not constitute sufficient compliance with the laws of the society to entitle the desired changed beneficiary to recover the amount of the policy.

APPEAL from a judgment of the Superior Court of Alameda County. Joseph S. Koford, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

J. Leonard Rose for Appellant.

Rose & Silverstein for Respondents.

KERRIGAN, J.—This is an appeal by plaintiff from a judgment in favor of the interpleading defendants for the amount of a policy of fraternal insurance.

The plaintiff is the surviving wife of Augusto J. Barboza, who died in the month of November, 1916, and the respondents are his three children, issue of a former marriage. In the year 1905 Barboza became a member of the fraternal society named in the title to this action, and there was issued to him at that time a policy or certificate in which the respondents were named as beneficiaries. In the month of October, 1916, he was ill and had been so for some time, and desiring to change the beneficiaries named in said certificate, which he had lost, he set about having issued to him a duplicate thereof, the immediate purpose of obtaining said duplicate being that he might indorse thereon the desired change, such indorsement being the first step prescribed by the rules of the society to be taken in making the change. In order to obtain this duplicate certificate he made and signed an affidavit upon the regular form provided by the society, but failed to fill in its blank spaces correctly. Instead of stating therein that his certificate was lost, and that therefore he desired to obtain a new one, he stated as a reason for making the affidavit that he desired to transfer the certificate to his wife. The secretary of the society returned this affidavit to Barboza as insufficient, stating with reference thereto "He cannot change the beneficiaries in this document." He then made a second affidavit, which was accepted by the secretary and presented to the supreme directors, who met on November 13, 1916, in regular session. The deceased died on the same day, and notice of his death was given to the supreme

directors while in session. After receiving such notice the supreme directors approved the second affidavit and ordered that a duplicate certificate issue "to the within member applying for the same." The laws of the society provided that a member may change beneficiaries "by making the change on the back of the policy or a duplicate thereof," and that if the policy has been lost or destroyed, in order to obtain a duplicate he must make an affidavit for that purpose, and that before a duplicate policy can be issued the supreme directors "must give their permission and approval to the supreme secretary before the issuance of said duplicate policy, and direct said supreme secretary to issue a duplicate policy." The rules further provide that when the change of beneficiary has been properly indorsed upon the back of the original or duplicate policy, the same must be filed with a designated body for approval or rejection.

[1] It is settled law that where the by-laws or constitution of a mutual benefit society provide a method of making a change of beneficiary, a member in making a change must follow substantially the method prescribed (*McLaughlin v. McLaughlin*, 104 Cal. 171, [43 Am. St. Rep. 83, 37 Pac. 865]). A member may change his beneficiary and name a new beneficiary whenever and as often as he pleases, provided he follows the steps required by the society's rules on the subject. [2] To this rule of law there are three recognized exceptions, namely: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of an insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course laid down in the society's rules was not pursued; (2) If it is beyond the power of the insured to comply literally with the regulations, a competent court will treat the change as having been legally made. Thus when a certificate is lost, or when it is in the possession of a beneficiary who will not surrender it, and it is therefore impossible for the member to comply with the rule, equity will enforce the change; (3) If the insured has pursued the course pointed out by the laws of the association, and has thus done everything devolving upon him to change the beneficiary, but before the new certificate issues he dies, a court of equity

will decree that to be done which ought to have been done, and act as though the certificate had been issued (*Supreme Lodge v. Price*, 26 Cal. App. 607, 617, [150 Pac. 803]).

[3] In the case at bar the deceased had been married to the appellant for over a year and a half, during which time he had done nothing to effect a change of beneficiary until his last illness and just before his death, when he filed the affidavits already referred to. The second affidavit being sufficient he became entitled to have issued to him a duplicate policy, upon which when received he could, if so minded at that time, have indorsed the desired change of beneficiary, and sent it to the supreme directors of the society for their action. But he undertook these necessary steps too late. Nothing in the record, we think, brings the case within any of the exceptions. It does not fall within the first of those heretofore enumerated, for the reason that there was no waiver by the society of compliance with its rules; nor within the second, for beyond evincing an intention to make the change he had done nothing except the preliminary step of setting in motion the machinery to obtain a duplicate of his policy, upon the receipt of which it still would have been optional with him to take or not the first step in the procedure prescribed for making the change, namely, indorsement on the policy of the new beneficiary. Nor does the case fall within the third exception to the general rule referred to, for the simple reason that the deceased had not done all the things required of him under the policy, leaving only ministerial acts to be done by the society. There is a wide distinction between a member doing all that he can up to the time of his death, and doing all the things required of him by the by-laws of the society. The author of Bacon on Benefit Societies, at section 48, says: "Much, however, depends upon the conditions expressed in the by-laws. . . . The general rule is that if the member does all in his power, that is, does all things required of him under the contract to effectuate the change, it will be held complete although the new certificate has not in fact been issued."

It follows from what we have said that the judgment should be affirmed, and it is so ordered.

Beasley, P. J., *pro tem.*, and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 22, 1919.

All the Justices concurred, except Melvin, J., who was absent.

[Civ. No. 2962. First Appellate District, Division One.—October 27, 1919.]

In the Matter of the Estate of CLEMENCE MAUVAIS, Deceased. EDITH MAUVAIS TEVIS et al., Respondents, v. JULIETTE M. FERGUSON, Individually and as Executrix, etc., Appellants.

- [1] ESTATES OF DECEASED PERSONS—REVOCATION OF PROBATE OF WILL—PERSONS INTERESTED—SUFFICIENCY OF PETITION.—A petition for the revocation of the probate of a will which alleges that the petitioners are the son and daughter of the deceased and that they, with two other persons named, constitute and are the sole heirs at law of said deceased, sufficiently shows that the petitioners are persons "interested" within the meaning of section 1327 of the Code of Civil Procedure.
- [2] ID.—PETITIONERS NOT PERSONS INTERESTED—RIGHT TO RAISE ISSUE BY ANSWER.—If for any reason not apparent upon the face of a petition for the revocation of the probate of a will the petitioners are not persons "interested" within the meaning of section 1327 of the Code of Civil Procedure, notwithstanding their status as heirs at law of the deceased, it is proper to challenge the right of the petitioners to wage the contest by answer creating an issue as to the necessary interest of the petitioners.
- [3] ID.—UNDUE INFLUENCE—INTENTION OF TESTATORS—STATEMENTS NOT EVIDENCE.—In a will contest on the ground of undue influence, declarations of the testatrix prior to and subsequent to the date of the will in issue that she intended treating all her children alike in the final disposition of her property are not of themselves sufficient to establish undue influence.
- [4] ID.—OPPORTUNITY TO INFLUENCE TESTATRIX—EVIDENCE OF UNDUE INFLUENCE.—Mere proof of opportunity to influence a testatrix's

3. Admissibility of declarations of testator not made at time of execution of will, on question of undue influence, notes, *Ann. Cas.* 1917D, 717; 3 *L. R. A.* (N. S.) 749.

mind, even when coupled with an interest or motive so to do, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act.

- [5] **ID.—PROOF OF GENERAL INFLUENCE.**—A case of undue influence is not made out by proof of a general influence over the affairs of the testatrix without proof that such influence was brought to bear upon the testamentary act.
- [6] **ID.—PROOF OF UNDUE INFLUENCE BY INDIRECT EVIDENCE.**—While the exercise of undue influence may be shown by indirect evidence, such evidence must do more than raise a suspicion; it must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.
- [7] **ID.—CASE AT BAR—INSUFFICIENT PROOF OF UNDUE INFLUENCE.**—In this proceeding for the revocation of the probate of a will the legal inferences, proper to be drawn from the circumstantial evidence relied upon by the contestants, amounted in weight and value to no more than to create the suspicion or surmise that the will in probate was procured through the undue influence of the proponent; and the proof relied upon was insufficient as a matter of law to upset the will in contest.

APPEAL from a judgment of the Superior Court of Santa Clara County revoking probate of will. P. F. Gosbey, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Delphin M. Delmas and Leib & Leib for Appellants.

Oliver Ellsworth and James P. Sex for Respondents.

Harry W. McNutt, *Amicus Curiae*.

BARDIN, J., pro tem.—This is an appeal from an order revoking the probate of the alleged will of Clemence Mauvais, deceased, and the accompanying judgment declaring said will to be null and void.

Two claims are urged in behalf of the appeal: (1) That the court was without jurisdiction to hear the petition for the revocation of probate of said will; and (2) that the evidence adduced below is insufficient to justify the findings

of the jury. These claims will be disposed of in the order stated.

Clemence Mauvais died on August 8, 1916, leaving as her sole heirs at law her four children, all of mature age, named Juliette Mauvais Ferguson, the appellant and proponent of the will, Romeo Mauvais and Edith Mauvais Tevis, the respondents and contestants, and Ernest Mauvais. Mrs. Mauvais left a written instrument dated June 16, 1907, purporting to be her holographic will, by the terms of which she left all her property to her daughter Juliette. On September 22, 1916, the order was made admitting the purported will to probate and appointing Juliette Mauvais Ferguson the executrix thereof, letters testamentary being thereupon issued to her.

Within one year after said order was made the contestants filed their petition containing allegations against the validity of said will and praying that the probate thereof be revoked. A demurrer was interposed against the petition based upon general and special grounds. The demurrer was ordered sustained on September 21, 1917, leave being granted to file an amended petition within ten days. An amended petition was filed September 29, 1917, seven days after the expiration of one year from the date of the order admitting the will in question to probate. The amended petition concededly contains all the essential allegations required by the statute. The appellant has ever since the filing of the amended petition asserted by appropriate pleadings and procedures the claim that the court was without jurisdiction to entertain the proceeding in contest of said will, and that the contestants were barred from procuring the relief sought, for the reason that the statute of limitations applicable to the subject matter in hand (Code Civ. Proc., sec. 1327) precluded the filing of a petition in contest of the will, after the expiration of the time limited by the statute, except it be in mere amplification of a petition filed within the prescribed time; and, that since the original petition failed to show that the contestants were persons "interested" within the meaning of the section of the code stated above, such defect could not be cured by amendment made after the expiration of the statutory period, and that, therefore, the bar of the statute must prevail.

The first petition contains the following allegation: "That your petitioners are son and daughter of said deceased, and that together with said Juliette Ferguson, a daughter, and Ernest Mauvais, a son, constitute and are the sole heirs at law of said deceased."

To this allegation there was added, in the amended petition, the following: "That said decedent in said alleged will leaves nothing whatsoever to any of her children except said daughter, Juliette, to whom she bequeaths and devises all her property and estate."

[1] We are of the opinion that the original petition as a pleading showed that the petitioners were persons "interested," within the meaning of the section of the code referred to. The contention of the appellant to the effect that the court was without jurisdiction to hear the contest or to grant the relief prayed for, is neither in accord with the views of the supreme court of this state already expressed upon this subject (*Estate of Zollikofer*, 167 Cal. 196, [138 Pac. 995]; *Estate of Land*, 166 Cal. 538, [137 Pac. 246]; *Estate of Benton*, 131 Cal. 472, [63 Pac. 775]), nor with that of other jurisdictions where similar statutory requirements have been prescribed. (40 Cyc. 1242; case note, 130 Am. St. Rep. 189; case note, L. R. A. 1918A, 448-452.)

[2] If for any reason not apparent upon the face of the petition the petitioners were not in fact "interested" within the meaning of the statute notwithstanding their status as heirs at law of the decedent, it would have been proper to challenge the right of the petitioners to wage the contest of decedent's will by answer creating an issue as to the necessary interest of the petitioners, and as was done in *Estate of Wickersham*, 153 Cal. 603, [96 Pac. 311], and in *Estate of Edelman*, 148 Cal. 233, [113 Am. St. Rep. 231, 82 Pac. 962].

We pass now to the consideration of the second point urged in behalf of this appeal.

The contestants' case is founded upon the theory that the proponent of the will in contest and the sole beneficiary therein named procured such will to be made against the will and wish of the testatrix by the exercise of undue influence, and that, therefore, it must follow that the paper purporting to be a will is invalid and void. The allegations

of the petition having relation to the charge of the exercise of undue influence are substantially as follows: That for some months prior to the execution of the alleged will the health of the decedent was seriously impaired, thus producing a weakened condition of the physical and mental powers of said decedent, which condition existed at the time of the exercise of the testamentary act in question and rendered her easily susceptible to undue and unreasonable influences; that decedent was a woman of strong and easily excited prejudices; that at the time of the execution of said alleged will the proponent made her home with the decedent, was in constant attendance upon her, and assumed charge of her affairs, and that by reason of decedent's said impaired mental and physical condition, and of proponent's close association with her, that decedent's will and mind became controlled and directed by proponent, who by false statements and prejudices embittered the mind of the decedent against her other children, and that under such circumstances and while under the domination and control of proponent and against her own will and wish, executed the purported will.

All these allegations of the petition were controverted by the answer. The findings of the jury were in favor of the contestants.

The will in contest was the second holographic will made by Mrs. Mauvais following the death of her husband. The record is silent as to the immediate circumstances attending its execution. The preparation of the first will bears close and significant relationship to the execution of the second one. Both wills were practically the same, the difference consisting only in the omission from the second will of the bequest of a watch to Romeo Mauvais and some articles of jewelry to Edith Tevis.

With reference to the preparation and execution of the first will, E. M. Rea, of the Santa Clara County bar, testified that for a number of years he had been the personal attorney of Romeo Mauvais, Sr., the pre-deceased spouse of Clemence Mauvais, and that upon the death of Mr. Mauvais, he became the attorney of Mrs. Mauvais, serving as legal adviser to her in matters personal to her own affairs, and also in her representative capacity as executrix of her deceased husband's last will. Mr. Rea testified that shortly following the death of Mr. Mauvais, which occurred

in the earthquake of 1906, Mrs. Mauvais requested him to call at the family home, which he did. Mrs. Mauvais stated to Mr. Rea on that occasion that she desired to make her will. At that time Mr. Mauvais' will was still in the family home. It was suggested by the attorney that, in view of Mrs. Mauvais' desire to be secretive about the execution of her will, she make a holographic will as her husband had done, which was agreeable to Mrs. Mauvais. She gave detailed instructions as to the disposition of her property, and her will was prepared with the assistance of Mr. Rea, who closely followed the phraseology of the holographic will of Mr. Mauvais as to form. The testamentary desires of Mrs. Mauvais were explicitly carried out. In explanation of the reason why she made her daughter Juliette practically the sole beneficiary under her first will (although she was accustomed to speak in loving terms of all her children), she stated to Mr. Rea, according to his testimony, that Edith "had everything she wanted and would never want for anything," and that "Ernest would get no good out of the money" for certain expressed reasons, "and that as long as Juliette had the money she was sure that Ernest could always come around and get some money when he needed it"; and that Juliette "had married poorly and that her husband was not in a position to do for her as he wanted to." Practically the whole of one afternoon was consumed in the preparation and execution of the will referred to. No one else was present at any time. Juliette Ferguson was not at the house at the time, and, so Mr. Rea testified, had not been for several days at that time. The will, as executed, was left with Mrs. Mauvais to be placed in a secret receptacle in the Mauvais home.

Referring to the holographic will in contest, dated June 16, 1907, Mr. Rea testified that "Mrs. Mauvais brought this present will up to my office; I looked it over in court yesterday. She showed it to me. So far as my memory goes it was that exact paper. She might have copied it again; I can't say; but it was the same as that will. She told me she had rewritten it and left out the provisions of the watch to Romeo and the jewelry to Mrs. Tevis, and she asked me to look it over and see if it was all right, which I did."

In 1908 the relation of attorney and client between Mr. Rea and Mrs. Mauvais ceased. She then retained Hiram D.

Tuttle, formerly a judge of the superior court of Santa Clara County, as her counsel. Judge Tuttle stated in his testimony that he was legal adviser to Mrs. Mauvais for several years, and that his impression was that she had shown him the will in contest and had consulted him as to its form.

The testimony of Mr. Rea and of Judge Tuttle touching the matters above referred to stands unimpeached and uncontradicted in the record.

There is no evidence directly showing that Juliette Ferguson had anything at all to do with the preparation or execution of either of the wills referred to or knew or suspected either was being made. She positively swore that she did not know of their existence until after they were made, and there is no proof to the contrary. She stated that she did not learn of the preparation of the first will until after her mother's death.

The evidence does not disclose that the decedent suffered any serious impairment of health until after the execution of the will in probate; in fact, not until some months following its execution. There is not even slight evidence in the record showing that at the time of the exercise of either of the testamentary acts referred to in the evidence, either her mental or physical powers were in a debilitated or weakened condition. In fact, the evidence shows that mentally she was a woman of superior will power and possessed a firm and determined mind, not only at the time of the execution of the will in probate, but for years afterward, and until her last illness.

Mr. Rea testified that at the time she made the first will she was in perfect health. Quoting from his testimony relative to the quality of her mind: "During the long acquaintance I had with her I had opportunities to judge of her intelligence. . . . She was very superior to either the ordinary man or woman in business. . . . Mrs. Mauvais had a very technical mind and she got to the bottom of things. When Mrs. Mauvais consulted me upon a law point, I have to use a vulgar expression, 'she was from Missouri and I had to show her.' She would take the statute and diagnose it herself and go over it and if my opinion didn't suit her, she would go to some other lawyer and come back and talk it over with me and before she got through she

would get right to the bottom of things. In matters of business in buying or selling or loaning money she was very thorough. Mrs. Mauvais had a very good idea of the value of real estate and of moral security of the people and she went into those things very thoroughly, a hundred times better than I could myself on a business proposition. In regard to her will, I would say that Mrs. Mauvais always made up her own mind. I dealt with her for years. Mrs. Mauvais was a person who made up her mind from personal investigation. She was exceedingly firm and determined. She was never a woman of vacillating purpose of will on anything that I ever saw in all the many years of acquaintance, both socially and in business."

Judge Tuttle testified that he was the legal adviser of Mrs. Mauvais for several years following 1908, and that "from her first appearance in my office I was impressed with her understanding, thorough understanding of her business. She was a capable woman; she was above the average in mentality. She understood her affairs, she understood things when they were explained to her and insisted upon explanations frequently in matters that other clients would not be apt to insist upon, and matters would have to be explained to her fully frequently before she would adopt the advice which I was disposed to give her. In a general way she was a very competent woman. I do not think anybody could persuade Mrs. Mauvais to do what she did not think was right. She was a high-minded woman with correct notions of right and wrong, duty and the violation of duty."

Stated in brief form, Dr. Filipello testified that he had been acquainted with Mrs. Mauvais for twenty years, and had been her regular family physician since about 1902. That he saw her socially quite often; "I always found that she was in perfect, clear, sound intelligence, very bright. She was firm in her decisions; very affectionate to her children, and she attended to her business regularly. . . . She was not a woman readily influenced by the opinion or the advice of others, even her physician." She often spoke about her business affairs.

Dr. Beattie testified that he had called upon Mrs. Mauvais professionally at the beginning of her last illness and attended her for some months; that "she was a very strong-

mind ed woman much to my surprise on many occasions. Absolutely self-reliant. She was quick and alert. I formed the opinion that she was a high-minded, high-principled woman and a woman of refined education."

Dr. J. U. Hall testified that he had attended Mrs. Mauvais professionally as a consultant, from time to time, for a period of eight years, beginning in January, 1908, and had opportunities to form, and did form, the opinion that she had, for a woman of her age, a keen, forceful, independent mind.

A number of letters written by the decedent to her children, for the most part subsequent to the execution of the will in probate, were offered in evidence. They show a degree of refinement and intelligence superior perhaps to that possessed by the average person. She continually addressed and spoke of all her children in terms of affectionate endearment and disclosed no degree of partiality nor suggestion of prejudice for or against any of them.

The relations existing between Mrs. Ferguson and her brothers and sister, during the years following the death of their father, Romeo Mauvais, Sr., were strained and fraught with misunderstandings and often with great bitterness of feeling. But it is not at all certain that these family disturbances and quarrels, and any false tales the daughter Juliette may have carried to her mother, had any perceptible or enduring influence upon the mind of the decedent. For instance, in a letter written by Mrs. Mauvais to her son Romeo in 1907 or 1908, having reference to previous difficulties between Juliette and Romeo, she wrote: "You know, Romeo, dear, I can't take any part in any of my children's misunderstandings." Much less may it be said that there is any substantial evidence in the record to which our attention has been directed which directly or indirectly establishes it as a fact that such family difficulties, or any statements made by the daughter Juliette to her mother, growing out of them, unduly influenced or unfairly affected the mind of the mother with reference to the composition and execution of the will in probate.

[3] Testimony was adduced on behalf of the contestant to the effect that the decedent had stated at times, both prior to and subsequent to the date of the will in issue, that

she intended treating all her children alike in the final disposition of her property. Such statements, however, are not of themselves sufficient to establish undue influence. (*In re Calkins*, 112 Cal. 296, [44 Pac. 577]; *Estate of Kilborn*, 162 Cal. 4, [120 Pac. 762]; *Estate of Lavinburg*, 161 Cal. 536, [119 Pac. 915].)

[4] The favored daughter had ample opportunity, so far as time and environment were concerned, to influence her mother's mind, but, as said in the *Estate of Kilborn*, 162 Cal. 4, [120 Pac. 762], "mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive so to do, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act."

[5] It may be assumed, as claimed by the contestants, that the beneficiary of the will in question exerted a general influence over the affairs of the testatrix; yet without proof that such influence was brought to bear upon the testamentary act, a case of undue influence is not made out. (*Estate of Morcel*, 162 Cal. 188, [121 Pac. 733].)

[6] The contestants offered no evidence directly showing the exercise of undue influence by the daughter Juliette with respect to the testamentary act itself in question. While it is of course true that the exercise of undue influence may be shown by indirect evidence, such evidence must "do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." (*Estate of Kilborn*, 162 Cal. 4, [120 Pac. 762]; *McDevitt's Estate*, 95 Cal. 17, [30 Pac. 101]; *Estate of Calkins*, 112 Cal. 296, [44 Pac. 577]; *Estate of Morcel*, 162 Cal. 188, [121 Pac. 733].)

"In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." (*In re Langford*, 108 Cal. 608, [41 Pac. 701].)

It seems very highly improbable that a woman of Mrs. Mauvais' mental capacity, temperament, and business experience, knowing how to write her will (having in fact already written two), accustomed to advise freely with lawyers, self-reliant and of decisive mind, and situated

as she was, would have permitted any paper which she had been forced to execute against her desires to stand for years without revocation.

[7] It appears to us that the legal inferences, proper to be drawn from the circumstantial evidence relied upon by the contestants, amount in weight and value to no more than to create the suspicion or surmise that the will in probate was procured through the undue influence of the proponent. We believe that the proof relied upon is insufficient as a matter of law to upset the will in contest.

The order and judgment appealed from are reversed and the cause remanded for a new trial.

Richards, J., and Waste, P. J., concurred.

[Civ. No. 2929. First Appellate District, Division One.—October 28, 1919.]

FRANK G. EDDY, Respondent, v. HARRY STOWE et al., Appellants.

- [1] **APPEALS—ALTERNATIVE METHOD—EVIDENCE—DUTY TO PRINT IN BRIEFS.**—It is not a compliance with the procedure governing appeals under the alternative method for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence material to the point made on the appeal should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein. The appellate court is not required to assume the vexatious burden of an examination of the typewritten transcript.
- [2] **ID.—EFFECT OF 1919 AMENDMENT.**—The 1919 amendment to section 953c of the Code of Civil Procedure does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the alternative method.
- [3] **NEGLIGENCE—COLLISION BETWEEN AUTOMOBILE AND HORSE—VERDICT—EVIDENCE.**—In this action for damages for personal injuries alleged to have been sustained by plaintiff as the result of a collision between a horse then being ridden by the plaintiff and an automobile operated by one of the defendants, the verdict was sup-

ported by testimony appearing in the reporter's transcript which warranted the jury in arriving at the conclusion that the accident was caused by the negligence of the defendant automobile driver, and that no actions of the plaintiff in the premises constituted negligence contributing proximately thereto.

- [4] **ID.—LAW GOVERNING CASE—DUTY OF AUTOMOBILE DRIVER.**—Such an action is not governed entirely by the provisions of the Motor Vehicle Act (Stats. 1915, p. 397). While both the plaintiff and the defendant had an equal right to the use of the road, if defendant was in the better position to avoid the collision, it was his duty to take all necessary steps to do so.
- [5] **ID.—KNOWLEDGE OF FRIGHT OF HORSE—DUTY OF AUTOMOBILE DRIVER.**—Where defendant had knowledge that plaintiff's horse was frightened, it was his duty to keep a lookout ahead, and as he approached the horse and rider, to note the movements of the horse, and when he saw, or by the exercise of reasonable caution could have seen, that the horse was under excitement, bucking and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve plaintiff of his perilous position.
- [6] **ID.—APPROACH OF FRIGHTENED HORSE—RIGHT OF DRIVER TO PROCEED—DISCRETION—CONSTRUCTION OF MOTOR VEHICLE ACT.**—The provision of the Motor Vehicle Act requiring the person driving a motor vehicle on the highway, approaching a horse on which a person is riding, and the horse appearing frightened, to reduce the speed of the car, and, if requested by signal or otherwise, by the rider of such horse, to proceed no farther toward such animal "unless such movement be necessary to avoid accident or injury," until such animal is under the control of its rider, does not vest the driver of the motor vehicle with discretion to determine whether such movement is necessary.
- [7] **ID.—STANDARD OF CARE—QUESTION FOR JURY.**—In such cases no fixed standard of care can be laid down as a matter of law, nor can it be said what conduct will amount to negligence; but, when the facts authorize the submission of the case to a jury, it should be left to them to determine from all the facts and circumstances whether or not the driver of the automobile exercised or failed to exercise ordinary care to avoid the accident, and whether or not the injured party observed due care. The legal measure of duty is the same upon both of the parties. Each must act with reasonable care to avoid an accident or collision.
- [8] **ID.—COMPLIANCE WITH MOTOR VEHICLE ACT NOT SUFFICIENT.**—In this action for damages for personal injuries alleged to have been

5. Duty of driver of automobile when horses are encountered on highway, notes, 1 L. R. A. (N. S.) 223; 14 L. R. A. (N. S.) 251; 48 L. R. A. (N. S.) 946.

sustained by plaintiff as the result of a collision between a horse then being ridden by the plaintiff and an automobile operated by one of the defendants, the fact that such defendant may have been proceeding along the highway in full compliance with the provisions of the Motor Vehicle Act did not relieve him of all obligations in the premises; but the jury were justified in finding that he was guilty of negligence in proceeding as he did, and that such negligence was the proximate cause of plaintiff's injuries.

- [9] **ID.—POSITION OF PLAINTIFF ON LEFT SIDE OF ROAD—NOT NEGLIGENCE PER SE.**—The fact that plaintiff was on the left side of the road did not constitute a violation of the statute governing the use of the highway amounting to negligence *per se* where his position in the highway was governed by the actions of his frightened horse, which he was unable to control.

APPEAL from a judgment of the Superior Court of Contra Costa County. A. B. McKenzie, Judge. Affirmed.

The facts are stated in the opinion of the court.

Winfield Dorn, J. E. Rodgers, R. E. Fitzgerald and Morrison, Dunne & Brobeck for Appellants.

Ostrander, Clark & Carey for Respondent.

WASTE, P. J.—This is an appeal from a judgment entered after a verdict of a jury in favor of the plaintiff in the sum of twelve thousand dollars damages, for personal injuries, alleged to have been sustained by respondent, as the result of a collision between a horse, then being ridden by respondent, and an automobile, being operated by appellant Stowe, an employee of the appellant, Mt. Diablo Scenic Boulevard Company.

Appellants' main contention is that the evidence submitted in the court below was insufficient to sustain the verdict against them, but, in fact, affirmatively shows to the contrary. Counsel for appellants have printed in their brief, and in the supplement appended thereto, those portions of the evidence upon which they rely as supporting their position. Respondent insists that the opening brief of appellants should not be considered, claiming that only such extracts from the

9. Violation of statute or ordinance regulating movement of vehicles as affecting violator's right to recover for negligence, note, 12 A. L. R. 458.

evidence are quoted as tend to support the views of the appellants, disregarding the testimony which conflicts therewith. An inspection of the brief convinces us that in a number of instances this is apparently true. Therefore, as was pointed out by the court in *McKinnell v. Hansen*, 34 Cal. App. 76-79, [167 Pac. 887], we are not in a position, without examination of the entire transcript, to assume that the quotations in the brief and printed in the supplement are complete as to the points argued, or to conclude without such examination, that the record does not contain the evidence necessary to sustain the verdict of the jury.

[1] It is not a compliance with the procedure governing appeals under the so-called alternative method, for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence, material to the point made on the appeal, should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein. Unless the record is thus prepared, the court cannot intelligently pass upon the appeal on its merits without imposing on counsel a further presentation of the record, or assuming the vexatious burden of an examination of the typewritten transcript. This the court is not required to do. (*Pasadena Realty Co. v. Clune*, 34 Cal. App. 33, 34, [166 Pac. 1027]; *Marcucci v. Vowinkel*, 164 Cal. 693, [130 Pac. 430].)

[2] The recent amendment to the Code of Civil Procedure does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the provisions of sections 953, 953a, 953b, and 953c of that code. When a party fails to comply with that requirement the court hearing the appeal shall direct such party to print and serve on the adverse party, and file with it, a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief. (Sec. 953c of the Code of Civil Procedure, as amended 1919, [Stats. 1919, p. 261].) In the instant case, in order not to delay the determination of the appeal, otherwise ready for consideration, we forbear from exacting compliance with the statute.

[3] We have, therefore, very carefully read the evidence, relied upon by appellant, and the other testimony appearing in the reporter's transcript bearing upon the same matters. From such examination we are convinced that the verdict is supported by evidence, which warranted the jury in arriving at the conclusion that the accident was caused by the negligence of appellant Stowe, and that no actions of the respondent in the premises constituted negligence contributing proximately thereto.

Plaintiff, who is a skillful rider and an experienced stockman, and known as such to appellant Stowe, was riding a young horse he was engaged in breaking on the highway between Danville and Mt. Diablo Park. The horse became frightened at a passing motorcycle, began rearing and bucking, and attempted to jump over the fence on the side of the highway. One of plaintiff's chaparejos caught on the barbed wire, which threw his foot out of the stirrup. While the plaintiff was engaged in subduing the horse an automobile approached, the occupants of which called to him. As it passed he saw the automobile, driven by appellant Stowe, coming from the other direction, "driving pretty fast," as far as plaintiff's knowledge of automobiles allowed him to judge. The horse, as described by plaintiff, was then "frightened and mad. . . . The horse shied agin the fence and I dug him back again . . . then he lunged, tried to get out of my hold, you see, as a horse will do, and when he was about in the center of the road . . . the horse was still rearing and lunging, and I saw the other machine [driven by Stowe], and I thought the horse would go past him, or past my own side of the road. At that time the horse just reared and the next thing I heard was glass flying, and my lights was out, like that." Plaintiff, upon cross-examination, testified that, as the automobile, driven by appellant Stowe, was approaching, his horse continued beyond his control to such an extent that while he could prevent it from running away, he could not otherwise direct its movements other than to allow it to rear and plunge. That such was the fact is fully corroborated by the testimony of other witnesses.

Appellant Stowe, by his own testimony, admittedly saw respondent before he, Stowe, met and passed the automobile which was going in the opposite direction. That distance was variously estimated from one hundred to two hundred feet.

There was nothing to prevent his having a clear and unobstructed view of the horse and the rider from that time until the collision occurred. After the other automobile passed the horse, Stowe observed, so he testified, that it was "frightened, jumping around, and crowding over toward the fence." From that moment, he contends, he did not see the horse, although he admitted that he knew the horse was there. According to his testimony, when he met the other automobile, he was going twenty miles an hour, and then "unconsciously slackened down to about eighteen," as the two machines passed. He made no effort to stop his car until after the collision. From the evidence, somewhat uncertain by reason of the references to the diagram of the scene of the accident, used at the trial, and which is not a part of the record, it appears that Stowe turned neither to the right nor to the left, in order to avoid the plaintiff's bucking horse. The collision took place on the edge of the strip of macadam which was in the center of the roadway, which, in turn, was forty-two feet wide between fences. The plaintiff was thrown from his horse and suffered very serious injuries, the gravity of which are not disputed by appellant, and for which the jury awarded the large amount of damages already alluded to.

It is appellant's contention that the case at issue is governed entirely by statutory law, as found in the act regulating the use and operation of vehicles upon public highways. (Stats. 1915, p. 397.) Pertinent portions thereof are, according to appellant, section 20, paragraph "a," which requires that the driver or operator of any vehicle, in or upon any public highway, shall drive and operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway, "and wherever practicable, shall travel on the right-hand side of such highway"; and section 20, paragraph "h," which requires that "every person having control or charge of any motor vehicle or other vehicle upon any public highway, and approaching any vehicle drawn by a horse or horses, or any horse upon which any person is riding, shall operate, manage and control such motor vehicle or other vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses, and to insure the safety and protection of any person riding or driving the same; and if such horse or horses appear frightened the per-

son in control of such motor vehicle or other vehicle shall reduce its speed, and if requested by signal or otherwise by the driver or rider of such horse or horses shall not proceed further toward such animal or animals unless such movement be necessary to avoid accident or injury, until such animal or animals be under the control of the driver or rider thereof."

[4] We do not think the case is governed entirely by the statute in question. Both Eddy and Stowe had an equal right to the use of the road, but if defendant was in the better position to avoid the collision, it was his duty to take all necessary steps to do so, one of them being his duty to slow down and even to stop his car, if necessary, to avoid running against plaintiff's horse. (*Furtado v. Bird*, 26 Cal. App. 152-158, [146 Pac. 58].) [5] With the knowledge that plaintiff's horse was frightened, it was appellant Stowe's duty to keep a lookout ahead, and as he approached the horse and rider, to note the movements of the horse, and when he saw, or by the exercise of reasonable caution could have seen, that the horse was under excitement, bucking and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve respondent of his perilous position. (*McIntyre v. Orner*, 166 Ind. 57, 63, [117 Am. St. Rep. 359, 8 Ann. Cas. 1087, 4 L. R. A. (N. S.) 1136, 76 N. E. 750]; *Ward v. Meredith*, 220 Ill. 66, [77 N. E. 118]; Huddy on Automobiles, 4th ed., secs. 128a, 129.)

There is no merit in the contention that appellant Stowe was relieved from negligence in the matter because of the fact that plaintiff, busily engaged, as he was, in subduing a frightened, bucking horse, did not signal him to stop as he approached. By his own testimony Stowe was not looking for a signal, because he "didn't feel that he [plaintiff] had his hands full with the horse," and "he [plaintiff] was the last man in the world to signal anybody to stop if his horse was unmanageable."

[6] The Motor Vehicle Act (section 20 [h], *supra*), as before noted, requires the person driving a motor vehicle on the highway, approaching a horse on which a person is riding, and the horse appear frightened, to reduce the speed of the car, and, if requested by signal or otherwise, by the rider of such horse, to proceed no farther toward such animal, "un-

less such movement be necessary to avoid accident or injury," until such animal is under the control of its rider.

Appellants contend, therefore, that under this provision the question whether or not under the given set of circumstances it was the duty of Stowe to stop his machine, in order to avoid the accident, was one to be answered by him, in the exercise of reasonable discretion, and failure to stop can be determined to be negligence only in the event of a clear showing of an abuse of such discretion. They quote, in support of this contention, Babbitt on "The Law Applied to Motor Vehicles" (second edition), section 1122, viz.:

"Under the language of the act, in some of the states the vehicle is required to remain stationary 'unless forward movement be necessary to avoid accident or injury.' In such cases it has been held that it is for the chauffeur to determine whether such movement is necessary. His conclusion is controlling, unless he acts unreasonably or in bad faith, and will not be open to question afterward."

An examination of the two authorities cited by the learned author of the work in question does not warrant an unqualified application of his language to the case at bar. In *McCummins v. State*, 132 Wis. 236, [112 N. W. 25], the court was construing the section of the Motor Vehicle Act of Wisconsin, [Laws 1905, c. 305, sec. 4], which provided that the driver of the motor vehicle, upon signal or sign of distress from the driver, or rider, of a frightened horse, should stop and "remain stationary, unless a movement forward shall be *deemed* necessary to avoid accident, etc." (The italics are ours.) The court, in brief, held "that the word 'deemed,' as used in this connection, conveys the idea that the standard upon which the operator is to act rests in his judgment." The word "deemed" does not occur in the California statute, and, furthermore, the court in that case said "This, of course, implies that he must act reasonably under the conditions presented to him." *McIntyre v. Orner*, *supra*, also cited by Babbitt, has no reference to the language of the statute imputed to it. On the facts, however, the court (at page 63 of 166 Ind., [117 Am. St. Rep. 359, 8 Ann. Cas. 1087, 4 L. R. A. (N. S.) 1130, 76 N. E. 752]) used the language we have already quoted in substance.

What appears to us to be a correct statement of the law in such cases is to be found in *Webb v. Moore*, 136 Ky. 708,

[125 S. W. 152] (also quoted in Babbitt), wherein the court said:

[7] "It is manifest that in cases like this no fixed standard of care can be laid down as a matter of law, nor can it be said what conduct will amount to negligence; and so the only rule that we can safely apply, when the facts authorize the submission of the case to a jury, is to leave it to them to determine from all the facts and circumstances whether or not the driver of the automobile exercised or failed to exercise ordinary care to avoid the accident, and whether or not the injured party observed due care. The legal measure of duty is the same upon both of the parties. Each must act with reasonable care to avoid an accident or collision. In some cases this degree of care as to the operator might require the machine to be stopped upon the first evidence of danger; in others it might be necessary to slow down the speed, and yet again, it might be more prudent to proceed at a high rate of speed, or not lessen the speed at which the machine is running. Each case presents different conditions and situations. What would be ordinary care in one case might be negligence in another. But, whatever the condition or situation, the driver of the automobile must, at all times and in all places, observe ordinary care to avoid injury to persons or travelers on the highway."

[8] There is much in the record to indicate that the appellant Stowe was at fault in this matter. While he may have been proceeding along the highway in full compliance with the provisions of the Motor Vehicle Act, he was not thereby relieved of all obligations in the premises. He was approaching a person whom he admits he saw to be riding a frightened horse. He saw the horse and rider at a distance sufficiently great to enable him to have stopped, if need be, in order to avoid an accident. We cannot but feel that the jury was correct in finding that he was guilty of negligence in proceeding as he did, and that such negligence was the proximate cause of plaintiff's injuries. Appellant, who was well acquainted with the plaintiff, and his ability as a rider, and his familiarity with horses, believed, according to his testimony, already referred to, that plaintiff would sufficiently subdue the horse to allow the automobile to pass safely on some portion of the wide highway. Consequently, he proceeded with no thought of taking precautions to avoid the injury

The facts are the same as those stated in *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515].

James E. O'Keefe and C. H. Van Winkle for Appellants.

Crouch & Crouch for Respondents.

THE COURT.—[1] On the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515], the judgment is affirmed.

[Civ. No. 3000. First Appellate District, Division One.—September 2, 1919.]

ROGERS BROTHERS COMPANY et al., Respondents, v.
F. W. HOLSAPPLE et al., Appellants.

[1] STREET LAW—ACTION TO FORECLOSE LIEN—PLEADING—EVIDENCE.
Judgment affirmed on the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515].

APPEAL from a judgment of the Superior Court of Imperial County. W. H. Thomas, Judge Presiding. Affirmed.

The facts are the same as those stated in *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515].

James E. O'Keefe and C. H. Van Winkle for Appellants.

Crouch & Crouch for Respondents.

THE COURT.—[1] On the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515], the judgment is affirmed.

[Civ. No. 8001. First Appellate District, Division One.—September 2, 1919.]

ROGERS BROTHERS COMPANY et al., Respondents, v.
F. W. HOLSAPPLE et al., Appellants.

[1] STREET LAW—ACTION TO FORECLOSE LIEN—PLEADING—EVIDENCE.
Judgment affirmed on the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515].

APPEAL from a judgment of the Superior Court of Imperial County. W. H. Thomas, Judge Presiding. Affirmed.

The facts are the same as those stated in *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515].

James E. O'Keefe and C. H. Van Winkle for Appellants.

Crouch & Crouch for Respondents.

THE COURT.—[1] On the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515], the judgment is affirmed.

[Civ. No. 8029. First Appellate District, Division Two.—September 23, 1919.]

E. C. LAUX, Respondent, v. LOS ANGELES STOVE CO.
et al., Defendants; J. H. SMITH, Appellant.

[1] TAX SALES—VOID DEED—REIMBURSEMENT OF PURCHASER.—Judgment affirmed on the authority of *Smith v. Golden State Syndicate et al.*, ante, p. 346.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. Everett Brown for Appellant.

Ward Chapman and L. M. Chapman for Respondent.

LANGDON, P. J.—This is an action to quiet title in the plaintiff to certain real property in Los Angeles. The complaint alleges that the plaintiff is the owner in fee simple of such property. The court found that the plaintiff was not the owner of the property; that his only claim to said property was by virtue of a certain tax deed executed by the city of Los Angeles. The court also found certain facts upon which it concluded that said tax deed was null and void, and that the defendant Smith was entitled to the possession of the property as against said plaintiff. Judgment was entered declaring that the plaintiff has no right and title to the property as against any of the defendants, but providing that said judgment shall not take effect until payment be made by the defendants or either of them to the plaintiff of the sum of \$561.35, the amount of taxes paid by the plaintiff upon the property. From the portion of the judgment requiring this payment the defendant J. H. Smith has appealed.

[1] The question of law involved in a decision of this appeal is the precise question considered by this court in the opinion this day filed in the case of *Smith v. Golden State Syndicate et al.*, *ante*, p. 346, [185 Pac. 209], which involves the same subject matter and the rights of the same parties as herein involved. For the reasons stated in that opinion, the portion of the judgment appealed from is affirmed.

Brittain, J., and Nourse, J., concurred.

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INDEX.

ABANDONMENT. See Criminal Law, 38; Landlord and Tenant, 1, 4; Trade Names, 3.

ABORTION. See Criminal Law, 14, 15.

ACCIDENT INSURANCE. See Liability Insurance, 1, 2, 5-10.

ACCOUNTING. See Appeal, 14, 18; Equity, 3; Estates of Deceased Persons, 1-3; Joint Adventures, 3; Judgments, 4; Parties, 5.

ACKNOWLEDGMENTS. See Evidence, 4; Mechanics' Liens, 14.

ADMISSIONS. See Alienation of Affections, 3; Findings, 4.

ADVANCEMENTS. See Chattel Mortgages, 3, Trusts, 1.

AFFIDAVITS. See Mechanics' Liens, 16; Municipal Corporations, 8.

AGENCY.

AUTHORIZATION TO SELL REAL ESTATE—POWER TO BIND PRINCIPAL.—

An instrument in writing headed "Authority to sell" and providing that a firm of real estate agents is "exclusively authorized to sell and receipt for a deposit on sale" of certain real property is not sufficient to empower the said firm to execute a contract for the sale of the property which would be binding upon the principal. (Slater v. Rauer, 748.)

See Corporations, 11, 12, 14, 27-29, 33; Findings, 6; Vendor and Vendee, 1, 4, 7.

ALIENATION OF AFFECTIONS.

- 1. ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.—**In an action for damages for the alienation of the affections of the former husband of the plaintiff, the complaint is sufficient where in very plain and direct language it charges the formation of a conspiracy by the defendants having for its object the alienation from the plaintiff of the affections of her former husband and thereby deprive her of his protection, assistance, and consortium, that such conspiracy was actually executed or carried out by the defendants, and that by reason of the wrongful acts of the latter the plaintiff lost the love and affection and the consortium of her said former

ALIENATION OF AFFECTIONS (Continued).

husband, although, in addition thereto, it contains some matters which are wholly immaterial to, and have no necessary connection with, the cause of action pleaded and which might properly be stricken from the complaint on motion. (*De Bock v. De Bock*, 283.)

2. **CAUSE OF ESTRANGEMENT—CONTRADICTION OF MATTERS IN PREVIOUS ACTION FOR DIVORCE—ESTOPPEL.**—In such action the plaintiff is not estopped from denying certain facts alleged in her former complaint in a previous action against her husband for divorce with reference to the cause of the estrangement. The parties to the two actions are not the same, and the subject matter of the two actions is entirely and wholly different. (*Id.*)
3. **EVIDENCE—FORMER DIVORCE COMPLAINT ADMISSION AGAINST INTEREST.**—In such action for damages for alienation of the affections of the former husband of the plaintiff, the complaint in the action for divorce previously brought by the plaintiff against the husband can perform no other office than that of evidence of an admission upon the part of the plaintiff that the material facts stated in such divorce complaint, which was verified, were true. It is not, of course, conclusive evidence of the truth of the facts so stated, and may be rebutted, but it constitutes an admission against interest which may, and should be, considered in the determination of the issues of fact in the subsequent action. (*Id.*)
4. **JUDGMENT—SUFFICIENCY OF EVIDENCE.**—In this action for damages for alienation of the affections of the former husband of plaintiff, the evidence, which was entirely of circumstances, while not legally sufficient to justify a verdict against the defendant to whom such former husband had transferred his love and affection, was sufficient to warrant a verdict against the other defendants, who were relatives of such former husband. (*Id.*)
5. **FEELINGS OF HUSBAND AND WIFE TOWARD EACH OTHER—EVIDENCE OF CONVERSATIONS ADMISSIBLE.**—In such action, evidence of conversations between the husband and wife is admissible to indicate their feelings toward each other. (*Id.*)
6. **ACTION FOR DAMAGES—STATE OF HUSBAND'S FEELINGS—EVIDENCE—HEARSAY DECLARATIONS.**—In an action for damages by a wife against her husband's parents for the alienation of the husband's affections, testimony of the plaintiff, supplemented by that of her witnesses, as to declarations which they claimed the husband made in their presence, of criticism and unkind remarks, and attempts to influence him against his wife, made by his parents, chiefly his mother, is admissible for the purpose of showing the state of the husband's feelings during the period in question; and its admission over the objections of defendants' counsel that it is incompetent and hearsay is not error, where the jury are expressly instructed

ALIENATION OF AFFECTIONS (Continued).

that they are to receive it for no other purpose, and that it is not competent evidence to prove any of the conduct or statements therein attributed to the defendants. (*Bourne v. Bourne*, 516.)

7. **EVIDENCE COMPETENT FOR SINGLE PURPOSE—ADMISSIBILITY OF.**—Where evidence is competent and material for any purpose under the issues on trial, it is admissible for that purpose, although it may be inadmissible and prejudicial when applied to other issues to which it is pertinent. (*Id.*)
8. **DETERMINATION OF HUSBAND TO ABANDON WIFE—ASSISTANCE BY PARENTS—LIABILITY—PRESUMPTION OF BAD MOTIVE.**—Where the determination of the husband to abandon his wife was the result of his own volition and not influenced by any willful or malicious act of his parents, the latter cannot be held responsible because they assisted him in carrying out his purpose; and no presumption of a bad motive arises from the mere fact that they gave him such assistance. (*Id.*)
9. **MARRIAGE OF CHILD—RIGHT OF PARENTS TO FURTHER CONSIDER WELFARE OF.**—The marriage of a child does not terminate the right of the parents to interest themselves in his or her happiness and welfare; and so long as they in good faith act for what they believed is their child's welfare, no matter how mistakenly, and are not moved by malice or ill will toward the partner to the marriage, there is no liability, even where they use their influence to bring about a separation. (*Id.*)
10. **RELATIONSHIP OF PARENT AND CHILD—RIGHT TO SIDE WITH CHILD IN CASE OF MARITAL INFELICITY—MALICIOUS INTERFERENCE—PRESUMPTION.**—The relations of a parent, particularly of a mother toward her son, are scarcely less sacred than the relationship between husband and wife; and in cases of marital infelicity, no presumption of malicious interference arises because the parents take sides with their child, unless it affirmatively appears that it is done in bad faith and from ill will toward the other party. (*Id.*)
11. **SAYING OF HARSH AND UNKIND THINGS—INFERENCES.**—The fact alone that in moments of resentment of their daughter-in-law's actions and refusal to accept their attempts at reconciliation the husband's parents said harsh and unkind things about her will not justify an inference that they violated the laws of God and society by trying to break up the marriage relation of their son and his wife. (*Id.*)
12. **SEPARATION BY SON—FAILURE TO ASSIST DAUGHTER-IN-LAW—INFERENCES.**—The fact that the parents permitted the separation of their son without offering any aid or comfort to the deserted wife constituted the violation of no legal duty, and in itself raised no inference that they instigated his desertion. (*Id.*)

ALIENATION OF AFFECTIONS (Continued).

13. **CONSIDERATION OF EVIDENCE—PROVINCE OF JURY.**—While the jurors are the sole judges of the weight and sufficiency of evidence, their province in receiving or rejecting evidence, as they are by the court instructed, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. (Id.)
14. **ACTION FOR DAMAGES—ESSENTIALS TO RECOVERY.**—In an action for damages by a wife against her husband's parents for the alienation of the husband's affections, the plaintiff, to support a verdict against the defendants, must establish that the defendants knowingly and willfully influenced their son to withdraw his affection and companionship from her, and that this was done in a spirit of malice and ill will toward her. (Id.)
15. **PRESENCE OF MOTIVE FOR ALIENATING SON'S AFFECTIONS—LOSS OF LOVE FOR WIFE—EVIDENCE OF CAUSE.**—The fact that the parents may have had a grudge against their daughter-in-law, or a motive for alienating their son's affections, would not suffice to prove that his love for his wife waned and flickered out as the result of his parents' conscious and willful influence or persuasion, and not as the result of some innate cause born within his breast unassisted by any acts on the part of his parents, done for the purpose and with the intent of bringing about that condition of heart within him. (Id.)
16. **ABSENCE OF EVIDENCE OF ILL WILL OR MALIGN INFLUENCE—UNSUPPORTED VERDICT.**—In this action for damages by a wife against her husband's parents for the alienation of the husband's affections, in view of the absence of any direct evidence of ill will or malign influence on the part of the defendants, the evidence was wholly insufficient to justify a verdict against strangers, much less as against the parents. (Id.)
17. **PREFERENTIAL RIGHTS OF PARENTS—PRESUMPTIONS AS TO ACTS.**—In actions for damages for alienation of affections the law places the parents of a married child on a much more favorable basis than that of a stranger to the family relations; and in such actions all presumptions must be that the parents acted only for the best interests of their child. (Id.)
18. **WEALTH OF PARENTS—HEARSAY DECLARATIONS.**—In an action for damages by a wife against her husband's parents for the alienation of the husband's affections, it is error to admit, over the objections of defendants' counsel, plaintiff's testimony of declarations by her husband as to his father's wealth. (Id.)

ALIMONY. See Divorce, 6.

AMENDMENTS. See Pleading, 2.

APPEAL.

1. **REVIEW OF FINDINGS BY APPELLATE COURT—EVIDENCE CONSIDERED.**
In determining whether the findings of the trial court are supported, the appellate court is required only to look to the testimony presented by the prevailing party and, if sufficient, it may disregard any adverse showing made by the other party. (*Keyes v. Nims*, 1.)
2. **QUESTION NOT CONSIDERED THROUGH OVERSIGHT—REHEARING NOT NECESSARY.**—Where the appellate court, through oversight, fails to consider the question of interest allowed by the trial court, such matter may be considered and disposed of on application for a rehearing without ordering a rehearing. (On petition for rehearing. (*Id.*))
3. **FINDINGS—EVIDENCE.**—Every intendment should be indulged in favor of the findings of the trial court, and they should not be overthrown on appeal unless it clearly appears that the conclusions reached are without the support of substantial evidence. (*Simpson v. Smith*, 94.)
4. **ALTERNATIVE METHOD—UNDERTAKING.**—Under the new and alternative method of appeal provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907, an undertaking is not required. (*Nezik v. Cole*, 130.)
5. **PERFECTING OF APPEAL—PREPARATION OF RECORD.**—Under the new and alternative method of appeal, the party aggrieved, in order to perfect an appeal, is only required to file the notice of appeal provided for by section 941b of the Code of Civil Procedure. Having thus properly taken an appeal, he is not required to have a reporter's transcript of the proceedings made up and prepared as provided by section 953a of the same code, but may cause to be duly prepared and settled a bill of exceptions, containing the usual statement of the matters occurring at the trial, in accordance with section 650 thereof. (*Id.*)
6. **FRIVOLOUS APPEAL—PENALTY.**—In this action, it being obvious that the whole procedure of the defendant had been marked with a deliberate design to delay the operation of justice in respect to the enforcement of his just and legal obligation, the judgment was affirmed with an added penalty of five hundred dollars imposed upon the appellant for the taking and prosecution of a frivolous appeal. (*Findley v. Lindsay*, 158.)
7. **LAW OF CASE—NEW TRIAL—DIFFERENT FACTS.**—The law of a case determined by an appeal does not apply to a new trial of the case in which substantially different facts are presented. (*Robben v. Benson*, 204.)
8. **FINDING NOT QUESTIONED—TAKEN AS TRUE.**—Where the sufficiency of the evidence to sustain a finding of the trial court is not ques-

APPEAL (Continued).

tioned in any way the finding is to be taken as true on appeal. (Id.)

9. **DUTY OF APPELLANT—OBJECTIONS CONSIDERED.**—It is the duty of the appellant to point out the evidence or the lack of evidence showing a finding assailed is unsupported. The court on appeal will look only to the objections argued. (Id.)
10. **NEW TRIAL—ORDER DENYING.**—Where the court's order denying a motion for a new trial was made after the right of appeal from such orders had been taken away by amendment of the statute, an appeal therefrom will be dismissed. (*San Joaquin L. & P. Co. v. Barlow*, 241.)
11. **ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEF.**—The legislature did not intend, by the enactment of section 953c of the Code of Civil Procedure, relating to the taking of appeals under the alternative method, that the appellant should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for a reversal, but only such portions of the record as he desires "to call to the attention of the court." (*De Bock v. De Bock*, 283.)
12. **EVIDENCE NOT BROUGHT UP—PRESUMPTION.**—Where an appeal is taken on the judgment-roll alone, the appellate court, not knowing what evidence was introduced, nor what objections were made thereto, must presume, in support of the judgment, that evidence supporting the findings of the trial court was properly admitted. (*Smith v. Golden State Syndicate*, 346.)
13. **WAIVER OF OBJECTIONS TO EVIDENCE—PRESUMPTION.**—On appeal on the judgment-roll alone, it will be assumed in support of the judgment that all objections to evidence sustaining the findings were waived. (Id.)
14. **ACCOUNTING—NATURE OF INTERLOCUTORY JUDGMENT.**—In this action for an accounting after dissolution of a partnership the so-called "interlocutory judgment" entered was a final judgment from which, and each of the special orders following, an appeal was legally permissible. (*Williams v. Reed*, 425.)
15. **PRESUMPTIONS.**—An appellate court will never indulge in presumptions to defeat a judgment. (Id.)
16. **APPEAL—CONSIDERATION OF FACTS ASSERTED IN BRIEF.**—The appellate court cannot take notice of alleged facts which rest solely upon the mere assertion of counsel in their brief, even where such counsel has the confidence of the court. (Id.)
17. **APPEAL ON JUDGMENT-ROLL—SUFFICIENCY OF EVIDENCE—PRESUMPTION.**—Where there is nothing legally before the appellate court that can be considered which will help in arriving at a con-

APPEAL (Continued).

- elusion as to whether or not the evidence offered was sufficient to support the judgment, that court is bound to presume that the evidence offered, whatever it was, was sufficient for such purpose. (Id.)
18. **DEFAULT—MOTION TO OPEN—CONFLICTING AFFIDAVITS—ORDER.**—An order denying a motion to open a default and set aside an interlocutory judgment in an action for an accounting after dissolution of a partnership will not be disturbed on appeal where there is a sharp and decided conflict as to the questions presented by the affidavits of the respective parties. (Id.)
19. **DISCRETION OF COURT—PRESUMPTION.**—A motion under section 473 of the Code of Civil Procedure to open a default and vacate an interlocutory judgment is addressed to the discretion of the court, and should be liberally exercised to promote justice and prevent fraud; and the presumption is that, in the absence of satisfactory showing to the contrary, the lower court so exercised its discretion. (Id.)
20. **DISREGARD OF SUMMONS AND COMPLAINT SERVED—DENIAL OF RELIEF.**—Where the defendant was served with summons and complaint, but paid no attention thereto, the contention cannot successfully be maintained that his default was because of inadvertence, mistake, surprise, or excusable neglect. (Id.)
21. **ORDER DENYING NEW TRIAL.**—There is no right of appeal from an order denying a motion for a new trial. (*N. B. Livermore Co. v. Guardian C. & G. Co.*, 549.)
22. **TIME—EXTENSION OF.**—Under section 939 of the Code of Civil Procedure, the sixty-day limit of time for appealing from a judgment cannot be extended, except by the pendency of proceedings on motion for a new trial. (*Leake v. City of Venice*, 568.)
23. **REVIEW OF CONFLICTING EVIDENCE.**—The appellate court may not review conflicting evidence on which a given finding is based. (*Simpson v. Malter*, 662.)
24. **PRESUMPTION.**—The appellate court will indulge in every presumption with regard to the evidence which will support the findings of the trial court upon which the judgment is based. (Id.)
25. **UNSUPPORTED STATEMENTS IN BRIEFS.**—An appellate court will not consider statements in briefs which find no support in the record on appeal. (*Rich v. Moss Beach Realty Co.*, 742.)
26. **ACTION FOR COMMISSION—CONFLICTING FINDINGS—MISCARRIAGE OF JUSTICE.**—In an action for the balance due on an open book account for commissions claimed by the plaintiff for making sales of land owned by the defendant a finding that the plaintiff had a written contract entitling him to thirty-five per cent of the selling price of lots conflicts with a finding that the rea-

APPEAL (Continued).

sonable value of the plaintiff's services was twenty-five per cent of the selling price of the lots, but in no case in excess of the amount paid by the purchasers, and on appeal on the judgment-roll alone from a judgment based on the latter finding the appellate court cannot disregard either of these findings or say that the plaintiff is entitled to a judgment in accordance with the first of the two findings, but if the first finding is correct, judgment in accordance with the second finding constituted a miscarriage of justice. (Id.)

27. ALTERNATIVE METHOD—EVIDENCE—DUTY TO PRINT IN BRIEFS.—It is not a compliance with the procedure governing appeals under the alternative method for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence material to the point made on the appeal should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein. The appellate court is not required to assume the vexatious burden of an examination of the typewritten transcript. (Eddy v. Stowe, 789.)

28. EFFECT OF 1919 AMENDMENT.—The 1919 amendment to section 953c of the Code of Civil Procedure does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the alternative method. (Id.)

See Contracts, 28; Criminal Law, 1, 32, 38, 39; Default, 1; Divorce, 1, 3, 6, 7; Estates of Deceased Persons, 6; Evidence, 7; Findings, 7; Guardian and Ward, 1; Mandamus, 1; Mechanics' Liens, 3; Negligence, 4, 7; Promissory Notes, 17; Receivers, 1; School Law, 2; Specific Performance, 3; Street Law, 4, 5; Waters and Water Rights, 6.

ARCHITECTS. See Municipal Corporations, 1-5.

ARGUMENT. See Criminal Law, 6.

ASSESSMENTS. See Corporations, 13, 19.

ASSIGNMENTS. See Bonds, 1; Corporations, 21, 24; Landlord and Tenant, 1-4, 9; Rescission, 3.

ATTACHMENT.

1. BOND FOR RELEASE OF—SUBSEQUENT BANKRUPTCY OF DEFENDANT.—Where a bond is executed for the release of an attachment, the subsequent bankruptcy of the attachment defendant will not relieve the bondsmen from their liability. (Tormey v. McLutosh, 411.)

ATTACHMENT (Continued).

2. **PURPOSE OF BOND—BY WHOM GIVEN—RECITALS IN—EVIDENCE—ESTOPPEL.**—The recitals of a bond given pursuant to the provisions of section 540 of the Code of Civil Procedure are conclusive as between the parties thereto; and where such a bond purports to be authorized and signed by the attachment defendant in compliance with the statute and recites that "whereas the said defendant . . . is desirous of giving the undertaking mentioned in the writ [of attachment], now, therefore, the undersigned," etc., in an action thereon, the bondsmen may not by their testimony show that the bond was not given by the defendant in the attachment suit for his benefit, but was given by them to protect their personal interest in the property attached. (Id.)
3. **SALE OF AUTOMOBILE—RETENTION OF TITLE—ACTION FOR PURCHASE PRICE—RIGHT TO ATTACHMENT.**—The vendor of an automobile under an installment contract, the possession of the machine being delivered to the vendee, in an action for the unpaid balance of the purchase price, is entitled to a writ of attachment under subdivision 1 of section 537 of the Code of Civil Procedure, where possession of the machine is not retaken, notwithstanding that the title to the machine is retained in himself. (Standard Auto Sales Co. v. Lehman, 763.)
4. **CONSTRUCTION OF ATTACHMENT STATUTES.**—Statutes permitting and providing for the levying of attachments must be strictly construed and followed. When the law designates and specifies in what instances an attachment may issue and in what cases it is not a legal remedy, the express will of the legislature must control. (Id.)

ATTORNEY AND CLIENT.

ADVICE TO DISPOSE OF PROPERTY—EXPRESSION OF OPINION.—A statement by an attorney to a client, who is not capable physically or mentally of giving his business ordinary care and attention due to cares and worries of a vexing and harassing nature growing out of certain litigation, that it is for the best interest of the latter that he at once dispose of all his property, is insufficient to constitute a misrepresentation as distinguished from a mere opinion. (McDougall v. Roberts, 553.)

See Corporations, 8.

ATTORNEY AT LAW.

DISBARMENT—EVIDENCE—FINDINGS—JUDGMENT.—In this proceeding for the permanent disbarment of an attorney at law, although there was a conflict in the evidence relating to the several charges against the accused, there was evidence of a substantial nature supporting the material allegations on each of the three counts on which the judgment of disbarment was founded, and the facts found estab-

ATTORNEY AT LAW (Continued).

Held that the accused was guilty of professional misconduct and showed that he was wanting in that integrity of character and conduct which the law rightfully requires from an attorney at law. (In re Hittson, 462.)

ATTORNEY'S FEES. See Divorce, 6; Liability Insurance, 9; Promissory Notes, 7.

BAIL. See Pleading, 3, 4.

BAKERSFIELD CHARTER. See Municipal Corporations, 3.

BANKRUPTCY.

1. **COMPOSITION—NATURE OF.**—A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the court, and, after notice and hearing, if approved by the court, an order is made confirming the same. (American Improvement Co. v. Lilienthal, 80.)
2. **EFFECT OF CONFIRMATION.**—Confirmation of a proposed composition is in effect a discharge. Its effect is to supersede the bankruptcy proceedings, and reinvest the bankrupt with all his property free from the claims of his creditors. (Id.)
3. **REINVESTMENT OF BANKRUPT WITH PROPERTY.**—While the bankrupt is reinvested with all his property by the composition, its effect in that regard is no more than to place it back in his hands as it was before the insolvency proceedings were instituted. (Id.)
4. **RELATIVE EFFECT OF DISCHARGE AND COMPOSITION.**—The composition has no more effect than a discharge would under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in section 17 of the Bankruptcy Act. A discharge, however, is not a payment or an extinguishment of the debts; it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not itself invalid. The discharge has merely destroyed the remedy, not the indebtedness. (Id.)
5. **VALID LIENS NOT DISCHARGED.**—A valid lien, created on the property of the bankrupt more than four months before the filing of the petition in bankruptcy, is not affected by his discharge. The discharge does not operate to cast off good and valid liens, given or acquired for the debt, nor to prevent their enforcement. It is purely personal to the bankrupt. (Id.)

BANKRUPTCY (Continued).

6. **JUDGMENT LIEN — EFFECT OF COMPOSITION.**—A judgment lien, obtained by filing a transcript of the judgment in the county recorder's office of the county in which the bankrupt owns property not exempt from execution, is not destroyed by involuntary bankruptcy proceedings commenced more than four months after such filing, when a composition between the bankrupt and his creditors is reached and confirmed by the court, although such composition releases the bankrupt from further personal liability to pay the judgment obtained against him. (Id.)
7. **ACTION BY CREDITOR AGAINST TRUSTEE — FAILURE OF TRUSTEE TO COMMENCE ACTION ON BEHALF OF ESTATE — INSUFFICIENT COMPLAINT.**—In an action by a creditor of a bankrupt on behalf of himself and other creditors against the trustee in bankruptcy for damages for refusal to commence an action against certain parties who are alleged to have seized and sold certain property of said bankrupt, and for the value of which said parties are said to be liable to his estate, the complaint does not state a cause of action where it fails to allege an abuse of the discretion with which the trustee is invested with respect to the bringing of actions in the interest and for the benefit of the estate. (Greene v. Moore, 91.)
8. **BRINGING OF ACTIONS ON BEHALF OF BANKRUPT ESTATE — DISCRETION OF TRUSTEE — RIGHTS OF CREDITORS.**—The trustee in bankruptcy and not a creditor or any number of creditors is the sole judge of the matter of when or whether to bring such actions; and in the absence of an abuse of the discretion with which he is invested he is not subject to the dictation or control of the creditors of the estate. (Id.)
9. **JURISDICTION OF FEDERAL COURTS EXCLUSIVE — REMEDY OF CREDITORS.**—While the proceedings in bankruptcy are pending in the federal court, the jurisdiction of that court over the assets of the bankrupt and the actions of the trustee in bankruptcy is exclusive. The remedy of a creditor is to apply to the federal court for relief from any neglect or refusal of the trustee to perform his duty, and that court upon a proper showing will compel the trustee to proceed or remove him for his disobedience or neglect of duty. (Id.)

See Attachment, 1.

BANKS AND BANKING.

1. **UNCLAIMED DEPOSITS — ESCHEAT TO STATE — CONSTRUCTION OF STATUTES.**—Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act, as they were amended in 1915, which are correlative and which deal with bank deposits upon which, except for the accumulation of interest, neither deposits nor withdrawals

BANKS AND BANKING (Continued).

have been made for a period of twenty years, are not to be given the construction that title to such money passes to the state absolutely on the expiration of twenty years, without compensation to the owner and without notice and hearing. (*Mathews v. Savings Union B. & T. Co.*, 45.)

2. **JURISDICTION OF COURTS IN RELATION TO DEPOSIT.**—After the expiration of such period of twenty years, jurisdiction to make any order in relation to such dormant deposits is not exclusively in the superior court of Sacramento County. Until suit is brought by the attorney-general in Sacramento County, the court having jurisdiction of an action by anyone for property which another without right withholds is open to the depositor, as well after as before the expiration of such period. (*Id.*)
3. **RIGHTS OF ATTORNEY-GENERAL ON INTERVENTION—POWER OF COURT TO DETERMINE OWNERSHIP.**—The right given the attorney-general, under section 1269a of the Code of Civil Procedure, to intervene in any action involving the right to property which has escheated or is about to escheat to the state, does not carry with it the right to delay the trial of such action, nor change the position of the parties. He must take the suit as he finds it, and, jurisdiction having attached in the court in which such action is pending, such court should determine the issue of the ownership of the property, notwithstanding that, since the commencement of that action, the statutory suit has been commenced by the attorney-general in Sacramento County to determine that question. (*Id.*)
4. **DEPOSITS UNCLAIMED FOR TWENTY YEARS—SUBSEQUENT ACTION BY ADMINISTRATOR—JUDGMENT.**—Where, after the expiration of the twenty-year period but prior to the bringing of the statutory suit by the attorney-general, the administrator of the estate of a deceased bank depositor brings suit against the bank to recover the deposit, with accrued interest, the plaintiff is entitled to judgment, notwithstanding the attorney-general intervenes and claims the money on behalf of the state. (*Id.*)

See Promissory Notes, 6.

BONDS.

1. **SURETYSHIP—NONLIABILITY OF SURETY TO LIEN CLAIMANTS—CONSTRUCTION OF BOND.**—Where a building contractor's bond expressly provides that neither such instrument nor any rights thereunder shall be assignable unless by the written consent of the surety, executed as therein specified, and that no right of action shall accrue upon or by reason of such bond to or for the use or benefit of anyone other than the obligee therein named, and that the obligation of the surety is and shall be construed strictly as one of

BONDS (Continued).

suretyship only, no right of action can accrue thereupon for the benefit of lien claimants, and the obligees therein cannot, either directly or by bringing a suit in interpleader against such surety, the contractor, and the lien claimants, work an assignment of the contract. Such surety cannot be held beyond the express terms of the contract. (*Terry v. Southwestern Building Co.*, 366.)

2. **PUBLIC WORK—CONSTRUCTION OF HIGHWAY—USE OF STEAM SHOVEL—LIABILITY OF SURETY TO OWNER.**—The surety on a bond executed to the state, pursuant to the provisions of the act approved March 27, 1897 (Stats. 1897, p. 201; amended, Stats. 1911, p. 1422), for due payment to be made by the principal for all labor, materials, and supplies furnished for the construction of a portion of the state highway, is not liable to the owner of a steam shovel for the reasonable value of the use thereof in the performance of the work, where such shovel was furnished to a subcontractor by a person having possession thereof under a lease or conditional sale contract, notwithstanding the latter was in default in his payments, the owner having made no attempt to interfere with his possession of the shovel and not having given notice of the termination of the lease or contract. (*H. B. Livermore Co. v. Guardian T. & G. Co.*, 549.)

See Appeal, 4; Attachment, 1, 2; Mechanics' Liens, 10.

BOUNDARIES. See Public Lands, 1, 2.

BROKER'S COMMISSIONS.

1. **NEGOTIATION OF SALE—WHEN COMMISSIONS EARNED—FAILURE OF PURCHASER TO PERFORM.**—Unless there is a provision in the contract to the contrary, a real estate broker, employed to negotiate a sale of land, earns his commission and it is payable when he produces, within the time allowed, a purchaser who is ready, willing, and able to take the property on the terms prescribed, or with whom the owner enters into a contract upon those or other terms satisfactory to him; and the broker cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or other terms of the contract not carried out. (*Stewart v. Bowie*, 751.)
2. **ABSENCE OF CONTRACT OF EMPLOYMENT—COMMISSIONS CONTINGENT UPON PERFORMANCE BY PURCHASER.**—Where there has been no previous contract of employment with the broker, and the owner's promise to pay him a commission is found only in a contract entered into between the owner and a prospective purchaser of the property, if the latter should fail to carry out his undertaking to purchase, the owner is released from his promise to pay the broker's commission. In such cases the broker, not having the

BROKER'S COMMISSIONS (Continued).

protection of the ordinary broker's contract for compensation for services to be performed, must stand or fall by the contract actually entered into; and if he has seen fit to allow the payment of his compensation to be dependent upon the performance of a contract made between other parties than himself, he cannot complain if through the nonperformance of that contract his own contingent rights be lost. (Id.)

8. **APPROVAL OF SALE AND PROMISE TO PAY BROKER—CONSTRUCTION OF CONTRACT.**—Where there was a valid employment of the broker with an agreement for his compensation, the production by the broker of a prospective purchaser within the time limit of his employment, although at a lower price than specified, and an acceptance by the owner of such prospective purchaser on modified terms by a valid contract in writing which, though somewhat ambiguous as to form, contained, first, a statement or report signed by the broker that it had sold the property on certain terms, detailing them, followed by a statement signed by the prospective purchaser that he agreed to buy the property upon the terms specified in said statement, adding that the sale was to be consummated in the office of the broker, and this being followed by an approval of sale and promise to pay the broker a stated sum on demand for its services, the owner, the prospective purchaser, and the broker were all parties to such contract, and the fact that the sale was not finally consummated by a transfer of the property did not affect the broker's rights. (Id.)

See Appeal, 26.

BUSINESS. See Workmen's Compensation Act, 15, 16.

CERTIORARI. See Pleading, 4.

CHARTERS. See Municipal Corporations, 1, 2, 6, 8; School Law, 1.

CHATTEL MORTGAGES.

1. **HARVESTING OF CROPS BY MORTGAGEE—PURPOSE OF PROVISIONS—CONSTRUCTION.**—In this action to compel the satisfaction and discharge of record of a certain crop mortgage given to secure a money loan, the provisions in the mortgage that the mortgagee should have the right to market the crops and receive therefor the prevailing rates or commissions, and that the mortgagor should purchase from the mortgagee the supplies needed in preparing the crops for market, were incorporated therein for the purpose of protecting the security for the payment of the money borrowed by the mortgagor from the mortgagee, and not to secure to the mortgagee the right to the possession of and to

CHATTEL MORTGAGES (Continued).

market the fruit when harvested or the right to furnish supplies to the mortgagee. (*Hayashi v. Pacific Fruit Exchange*, 677.)

2. **SECURITY FOR FUTURE ADVANCES.**—A mortgage may be given to secure future advances, the amount of which may not be ascertainable until proceedings in foreclosure are ripe, or to secure indorsements made and to be made, or to secure payment for merchandise, not exceeding a specified amount, to be delivered at different intervals of time in the future. (*Id.*)

3. **SECURITY FOR UNLIQUIDATED DEBTS.**—A mortgage may be given to secure the payment of a debt which, while not actually existing when the contract of hypothecation is made, is, from the nature of the contract and the whole subject matter thereof, inherently capable of coming into existence. (*Id.*)

See Liens, 1.

CITIES. See Municipal Corporations.

CLAIMS. See Workmen's Compensation Act, 1-3.

COMPENSATION. See Municipal Corporations, 1; School Law, 3; Workmen's Compensation Act, 1, 5.

COMPOSITION. See Bankruptcy, 1, 2, 6.

CONSIDERATION. See Contracts, 33; Guaranty, 1, 2; Leases, 10; Promissory Notes, 1-3, 14, 15, 19.

CONSPIRACY. See Criminal Law, 9.

CONSTITUTIONAL LAW. See Jurisdiction, 2, 3; School Law, 1; Statutory Construction, 1.

CONSTRUCTION. See Contracts, 38, 43, 44; Guaranty, 3; Indemnity, 1; Waters and Water Rights, 2.

CONTEMPT.

1. **CONTEMPT PROCEEDINGS—JURISDICTION OF SUPERIOR COURTS.**—The superior court has general jurisdiction to initiate and decide contempt proceedings. (*Drew v. Superior Court*, 651.)

2. **REFUSAL TO COMPLY WITH ORDER OF EXAMINATION—REFUSAL OF WRIT.**—A writ of prohibition will not issue out of the appellate court to prevent the superior court from hearing and deciding a contempt proceeding arising out of the failure of the petitioner to obey an order directing him to appear and submit to an examination before a referee in a proceeding supplementary to execution on the theory that the superior court was without jurisdiction,

CONTEMPT (Continued).

when the matters which the petitioner sets up in excuse for his nonappearance were not presented to the superior court for consideration and decision. (Id.)

See Depositions, I.

CONTRACTS.

1. **VENDOR AND VENDEE—ACTION FOR SPECIFIC PERFORMANCE—CONTRACT OF SALE INEQUITABLE—RELIEF.**—In this action to revise and specifically perform an agreement for the sale and purchase of real property, and for damages in the event specific performance could not be had, the court having found that the land agreed to be sold to defendant was worth less than the sum agreed to be paid, and the contract therefore inequitable, was correct in denying plaintiffs a decree in specific performance. Such a decree cannot be supported in the absence of a finding that the contract was just and reasonable, and the consideration adequate. (Morgan v. Dibble, 116.)
2. **RECOVERY OF DAMAGES.**—While there are contracts, perfectly valid, which a court of equity will not set aside for any unfairness, but which are so unfair that specific performance will not be decreed, the party being left to his remedy at law, an action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established; therefore, in this action, the trial court having determined that plaintiffs were not entitled to a decree in specific performance, judgment for damages should not have been entered against the defendant. (Id.)
3. **BREACH OF CONTRACT TO PURCHASE REAL PROPERTY—DAMAGES—IMPROPER ITEMS.**—The measure of damages for the breach of an agreement to purchase an estate in real property, as prescribed by section 3307 of the Civil Code, does not include such items as cost of certificate of title to the land, commission for obtaining the loan covered by the first mortgage which was agreed to be assumed by the defendants, or the agent's commission for making the sale. (Id.)
4. **PROVISION WITH REFERENCE TO MORTGAGES—CONTRACT TOO UNCERTAIN.**—A contract for the sale and purchase of real property containing a provision that the purchasers "shall assume a first mortgage of five thousand dollars due on or before five years from date, it being further understood that no payment shall be made on the principal until at least one year shall have elapsed, and any payment shall be made on any regular interest pay-day. Interest on said \$5,000 to be at the rate of 8% payable semi-annually," and, further, that the purchasers shall "assume a second mortgage" made payable to a given individual of \$19,700, pay-

CONTRACTS (Continued).

- able on or before ten years from date, interest payable at 7% per annum payable semi-annually, is not sufficiently definite and certain to support an action in specific performance. (Id.)
5. **RIGHT OF WAY FOR PIPE-LINE—PROVISION INDEFINITE.**—A provision in such contract that the vendors shall "give a right of way for a pipe-line from Fifth St. over the eastern boundary of five acre Lot 3," is so indefinite as to amount to no covenant at all. (Id.)
6. **OPTION PROVISION UNCERTAIN.**—A provision in such contract that "this agreement includes an option by which" the vendors "may purchase lot 6 of block 145 during the next six months for the sum of four thousand dollars to be deducted from the second mortgage," is likewise uncertain. (Id.)
7. **ESCROW INSTRUCTIONS AS PART OF AGREEMENT.**—In this action to revise and specifically perform an agreement for the sale and purchase of real property, the instruction prepared by the title company which the parties directed it to use as its "instructions for this exchange," constituted neither a separate agreement of sale nor a supplemental part of the first agreement. (Id.)
8. **PERFORMANCE OF CONDITIONS BY VENDORS—UNSUPPORTED FINDING—EVIDENCE.**—In this action the finding of the lower court that plaintiffs had performed, or were in position to perform, all the terms of the contract imposed on them, was not supported by the evidence, which showed that the first mortgage on the ranch executed by plaintiffs was not for the term provided in the agreement, that their land was subject to public easements which could not be removed, and that they executed a lease on the property extending beyond the time when the exchange was to be made. (Id.)
9. **AGREEMENT TO MAKE GOOD TITLE—KNOWLEDGE OF RIGHTS OF WAY—WAIVER OF FULFILLMENT.**—Where the vendors were in express terms obligated to make good title (except as to encumbrances specified), as a condition of sale, even actual knowledge by the purchasers of the true status of the rights of way would not, while the contract remained executory, be deemed to imply a waiver of substantial fulfillment of the condition for title. (Id.)
10. **INABILITY OF VENDORS TO PERFORM—RIGHT OF VENDEES TO RESCIND.**—Where, at the time of the execution of the sale and at the time when it should have been performed, the title to the vendors' land was incurably defective by reason of public servitudes, a cloud which in the nature of things they could not remove by ordinary methods of business negotiation, the purchasers were entitled to rescind at any time. (Id.)

CONTRACTS (Continued).

11. **VENDOR AND VENDEE—CONTRACT FOR SALE OF REAL PROPERTY—ACCEPTANCE OF OVERDUE PAYMENTS—SUSPENSION AND REVIVAL OF RIGHT OF FORFEITURE.**—Where time is made the essence of a contract for the payment of money, and this covenant is waived by acceptance of installments after they are due with knowledge of the facts, such conduct will be regarded as creating only a temporary suspension of the right of forfeiture, which may be restored by giving a definite and specific notice of an intention to enforce it. (*Bishop v. Barndt*, 149.)
12. **AGREEMENT OF VENDEES TO SELL TO THIRD PERSON—PRIVITY OF CONTRACT WITH ORIGINAL VENDOR.**—A purchaser of property under an installment contract, by entering into a contract of sale of said property to a third person, creates no privity of contract or estate between such third person and the original vendor without assigning his interest, in whole or in part, under the original contract of purchase. (*Id.*)
13. **ACTION TO DECLARE FORFEITURE—PARTIES—REMOVAL OF CLOUD FROM TITLE.**—Such third person having placed her contract to purchase of record, upon default of the vendees under the original contract of purchase, the original vendor was entitled to make her a party defendant in an action to declare a forfeiture of the rights of the original vendees and to have such cloud removed. (*Id.*)
14. **SUFFICIENCY OF NOTICE TO RESTORE RIGHT OF FORFEITURE—DUTY TO NOTIFY THIRD PARTY.**—In this action by the vendor to declare a forfeiture of the rights of the vendees in and to certain real property under an agreement of sale, the plaintiff, by the acceptance of installments after they were due, having worked a temporary suspension of the right of forfeiture, the notice given to the real party in interest under the agreement of sale was sufficient to revive and restore all plaintiff's rights under her contract. It was not necessary that she also give notice to the third person with whom her vendee has entered into an agreement of sale of such property to which she was not a party. (*Id.*)
15. **FAILURE TO COMPLY WITH NOTICE—FORFEITURE OF RIGHTS UNDER CONTRACT—DECREE—EQUITY.**—When the vendor gave the vendees a reasonable time to pay the money due under their contract of purchase, they should have met the requirements of the notice, and when they did not they forfeited all their rights under the contract in accordance with the terms therewith; and in an action brought for that purpose, the vendor was entitled to a decree that all their rights thereunder were at an end, in the absence of some equitable showing to excuse their failure to comply with the terms thereof. (*Id.*)

CONTRACTS (Continued).

16. **SPECIFIC PERFORMANCE—ADEQUACY OF CONSIDERATION—JUSTNESS AND REASONABLENESS OF CONTRACT—PLEADING AND PROOF.**—In this action by the vendor to quiet her title to certain property agreed to be sold, the original vendees being in default in the payments, the court committed error in decreeing specific performance of the contract of sale in favor of one of the defendants, a third person to whom such vendees had contracted to sell such property, it not being alleged in the answer of such defendant that the consideration to be paid plaintiff was adequate, or that the original contract of sale was just and reasonable, and no evidence was introduced upon this subject, and no finding made in regard to it. (Id.)
17. **RESCISSION—CONSTRUCTION OF CODE SECTIONS.**—Sections 1691, 3407, and 3408 of the Civil Code, which relate to the rescission of contracts, must be construed together. They are not mere statutory law, but are declaratory of well-understood principles of equity. (Hegel v. Hannas, 218.)
18. **RETURN OF PARTIES TO STATU QUO—EQUITY.**—It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed *in statu quo*. If equity can still be done between the parties, courts will grant relief to the defrauded party. (Id.)
19. **EXCHANGE OF REAL PROPERTIES—KNOWLEDGE OF FRAUD—MAKING OF CROPPING AGREEMENT—ACTION TO RESCIND—DECREE.**—Where one party to an exchange of real properties enters into a short-term cropping contract covering the land received by her prior to knowledge that the representations made to her were untrue, in a subsequent action to rescind the contract of exchange, provisions in the decree that the property conveyed by the plaintiff to the defendants be reconveyed to the plaintiff, that upon that conveyance the plaintiff deliver to the defendants a reconveyance of the property conveyed by the defendants to the plaintiff, and that the plaintiff also deliver to the defendants an assignment in writing conveying to the defendants all her rights and interest in and under the cropping agreement and also to all crops raised on said land under said agreement, are sufficient to restore the defendants to substantially the same position in which they would have been if the rescinded conveyances had not been made. (Id.)
20. **STATUTE OF FRAUDS—CONTRACTS NOT IN WRITING—ESTOPPEL TO ASSERT STATUTE—UNCONSCIONABLE INJURY.**—The mere omission to insist that a writing be made, or reliance only upon the unfulfilled promise of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other

CONTRACTS (Continued).

to his prejudice; and not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established. (*Standing v. Morosco*, 244.)

21. **TERM OF EMPLOYMENT—CONSTRUCTION OF MEMORANDUM.**—Where a memorandum with reference to one's employment contains no words fixing the term of service, but the compensation is to be paid at a weekly rate, the term should be construed as being from week to week. (*Id.*)
22. **PROMISE TO EXECUTE CONTRACT—SUFFICIENCY OF PAROL.**—A promise to execute "the usual theatrical contract" would be of no more potency when expressed in writing than by parol. (*Id.*)
23. **CONTRACT FOR PERSONAL SERVICES—ACTION FOR BREACH—INSUFFICIENT ALLEGATIONS OF ESTOPPEL.**—In this action for damages alleged to have been sustained by the plaintiff through the refusal of the defendant to use and pay for the services of the plaintiff after having employed him for a period of one year as an actor to appear in plays produced by the defendant, the complaint did not make out a case entitling the plaintiff to enforce his contract, which was not in writing and, therefore, admittedly within the statute of frauds. (*Id.*)
24. **VENDOR AND VENDEE—FAILURE TO MAKE PAYMENTS AS AGREED—ACCEPTANCE OF LESS THAN AMOUNT DUE—WAIVER AND REVIVAL OF RIGHT OF FORFEITURE.**—Where the vendees do not make payments punctually, and the vendor for nearly two years indulges them in this and accepts payments from time to time of less than the whole amount due at the time of such payments, such conduct operates as a waiver of that clause of the agreement making time the essence thereof, and creates such a temporary suspension of the right of forfeiture as can only be restored by giving definite and specific notice of an intention to enforce it. (*Bayside Land Co. v. Phillips*, 255.)
25. **REVIVAL OF RIGHT OF FORFEITURE—BURDEN OF PROOF—EVIDENCE—FINDING.**—In this action by the vendor to quiet title to certain real property in which the defendants claimed an interest under a contract of purchase, the plaintiff having conceded the waiver of the right of forfeiture, the burden was on him to show a revival of the terms of the contract by proof of a definite and specific notice of the intention to enforce it; and as the evidence on this issue was evasive, indefinite, and conflicting, the trial court was justified in its finding that such notice was not given. (*Id.*)

CONTRACTS (Continued).

26. **FAILURE TO GIVE NOTICE—FINDINGS ON OTHER ISSUES IMMATERIAL.**—In such action, the plaintiff having thus waived the right of forfeiture and having failed to prove the revival of that right, the trial court having found that notice of the intention to enforce the terms of the contract was not given, failure of the court to find on other issues became immaterial where a finding on each of those issues in favor of the plaintiff would not support a judgment in its favor. (Id.)
27. **AGREEMENT TO FURNISH WATER—BREACH—ACTION FOR DAMAGES—ALTERATIONS IN INSTRUMENT—EVIDENCE.**—In an action for damages for breach of a contract to furnish water for irrigation and domestic use upon a certain tract of land, an objection to the introduction in evidence of the contract, based upon the fact that certain printed matter therein had been stricken out, is without merit where there is nothing to indicate that the erasures of the printed lines were made after the execution of the instrument, where the parts stricken out are not material to the question in dispute, and it appears that the striking out of the matter was to make the contract comply with the terms of a preliminary contract entered into between the parties. (*Talander v. Tujunga Water & Power Co.*, 492.)
28. **ERROR IN DEED—WAIVER OF OBJECTION.**—In such action, an objection to the admission in evidence of the deed to plaintiff based on the fact that the contract for the water right was made by the "Tujunga Company" to plaintiff's predecessor, whereas the deed in question refers to a water right deeded to plaintiff's predecessor by the "Tujunga Water Company," cannot be urged for the first time on appeal. (Id.)
29. **SALE OF WATER SYSTEM—ASSUMPTION OF GRANTOR'S OBLIGATIONS.**—Where a water company acquires the water rights, irrigation plant, and system of another company, with full knowledge of a contract by which the latter company was bound to render certain water service, it takes the same impressed with the obligation to render such service, notwithstanding there is no express covenant in the grant as to the assumption of the obligation of the grantor. (Id.)
30. **FAILURE TO FURNISH WATER—LOSS OF CROP—MEASURE OF DAMAGE—EVIDENCE.**—While the true measure of damage for loss of crops, due to a breach of contract for furnishing water, is to determine the probable yield and market value of the crop, and deduct therefrom the cost of producing and marketing the same, where the plaintiff introduces evidence as to the value of the crop in the field, and there is no further showing as to the cost necessary to handle such crop, the court is justified in accepting plain-

CONTRACTS (Continued).

tiff's figures as tending to establish the amount of damage sustained. (Id.)

- 81. SHORTAGE OF RAINFALL—DISREGARD OF PREFERENTIAL RIGHTS OF PLAINTIFF—EVIDENCE.**—In an action for damages for breach of a contract to furnish water for irrigation and domestic purposes, the court is justified in ignoring the testimony of defendant's witness that a shortage of rainfall was the cause of the company's failure to supply water to plaintiff where the testimony further shows that during the months when the company failed to furnish any water to plaintiff it was supplying water to other lands and to other parties for irrigation, domestic use, and other purposes contrary to the provisions of the contract under which plaintiff was entitled to water. (Id.)
- 82. SUBSEQUENT INABILITY OF PERFORMANCE—EFFECT OF.**—A contract valid in its inception may become voidable or impossible of performance by the failure of a subsequent contingency, but if the contingency is one which may happen, the parties are bound by their contract until it can be determined it cannot be enforced. (*Nannizzi v. Caprile*, 498.)
- 83. UNDUE INFLUENCE—DISPOSITION OF PROPERTY—INADEQUATE CONSIDERATION—REMEDY.**—Where a person through undue influence has been induced to part with his property for an inadequate consideration, his remedy is rescission and not damages; and prompt rescission and offer of restitution are essential to a recovery. (*McDongall v. Roberts*, 553.)
- 84. LIABILITY OF GUARANTORS AND SURETIES—EXTENSION OF.**—Guarantors and sureties cannot be held beyond the express terms of their contracts. Thus, where the limit of their liability is the purchase price of certain property, which is being sold under a lease contract, this liability cannot be extended to cover rentals accruing under the lease or damages for breach of the contract. (*Murphy v. Hellman Commercial etc. Bk.*, 579.)
- 85. DEFAULT OF PURCHASER UNDER LEASE CONTRACT—TERMINATION OF CONTRACT—ELECTION OF REMEDIES.**—Where the seller of property under a lease contract, upon default of the purchaser, takes back the property, he treats the contract of sale as at an end. He is then required to stand upon his contract and sue for the breach, or to treat the contract as ended and sue for the rescission. He cannot pursue both remedies. (Id.)
- 86. TERMINATION OF CONTRACT—LOSS OF RIGHT TO SUE FOR PURCHASE PRICE—RELEASE OF COLLATERAL.**—Where the seller elects to treat the contract of sale as at an end, he not only loses his right to sue for the purchase price of the property but, by terminating his contract, he loses his right to foreclose on the collateral given as security for the payment of the purchase price. (Id.)

CONTRACTS (Continued).

37. "DISSATISFACTION CLAUSES"—EXERCISE OF RIGHT.—The distinction is well recognized—though the line cannot always be very clearly drawn—in actions arising on "dissatisfaction clauses" of contracts that where the right involved is one which is submitted to the taste or fancy, feeling, or judgment of the party in whose favor the option is given, it may be exercised without any practical or utilitarian reason; but when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded. (*Van Demark v. California H. E. Assn.*, 685.)
38. GENERAL RULE—PARTY TO BE JUDGE—GOOD FAITH.—Where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith; and if he does so act and is really dissatisfied, he may reject the work or the article on the ground that is not satisfactory to him. (*Id.*)
39. PERSONAL DISSATISFACTION OF BUYER—ELEMENT OF VALUES OR QUALITY IMMATERIAL.—Where it is clear that the purpose of an agreement to repurchase in the event the buyer should become "dissatisfied with the investment" is to submit the matter to the personal option and judgment of the purchaser, the exercise of this right is not dependent upon a failure in value of the property, or a breach of any condition of the contract. It is made a question alone of the buyer's dissatisfaction with the "investment"—a matter which might develop into a condition of personal dissatisfaction entirely independent of values or quality. (*Id.*)
40. EFFECT OF FULFILLMENT OF AGREEMENT.—The fulfillment of the terms of such an agreement does not involve the loss of the vendor's property, but amounts only to a rescission. He gets his property back and refunds the purchase money with interest. (*Id.*)
41. DISSATISFACTION WITH INVESTMENT—PLEADING.—In an action by the buyer under such a contract it is sufficient to allege that he became dissatisfied with the investment, without alleging any facts as reasons or grounds for such dissatisfaction. (*Id.*)
42. LIMIT OF OBLIGATION TO REPURCHASE—TIME—CONSTRUCTION OF AGREEMENT.—An agreement to repurchase "at any time between the fifth and sixth year from the date of planting" does not limit the obligation to repurchase to the infinitesimal period between the close of the last day of the fifth year and the beginning of the first day of the sixth year, but to the period between the last of the fifth and the last of the sixth year—or during the sixth year. (*Id.*)

CONTRACTS (Continued).

43. **REASONABLE CONSTRUCTION.**—It is a well-settled principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair, unusual, and extraordinary, and another construction equally consistent with the language would make it reasonable, fair, and just, the latter construction is the one which must be adopted. (Id.)
44. **CONSTRUCTION OF—SURROUNDING CIRCUMSTANCES.**—Where contracts are ambiguous, the circumstances surrounding and known to both parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed. (Id.)
45. **UNILATERAL AGREEMENT TO SELL—ACCEPTANCE BY PURCHASER—PART PAYMENT.**—A unilateral agreement or option to sell certain real property upon stated conditions, one of which is the payment of a given sum of money upon a specified date, becomes a binding agreement upon both parties when upon the day fixed for payment the purchaser pays and the vendor accepts a portion of said sum and the purchaser obtains the vendor's consent to wait thirty days for the payment of the balance. (*Petersen v. Bunting*, 707.)
46. **DEFAULT IN PAYMENT OF BALANCE—RECOVERY OF MONEY PAID.**—Such purchaser thereafter being in default, unexcused, in the payment of the balance, and having made no tender of complete performance, and the vendor acknowledging his obligations thereunder and standing upon its terms, the former is not entitled to receive back from the latter the money paid by him. (Id.)
47. **REASONABLE TIME—QUESTION OF FACT—SPECIAL CIRCUMSTANCES—NECESSITY TO SET UP IN ANSWER.**—The question of "reasonable time" is generally a question of fact and depends upon the circumstances of each particular case. If there are any special considerations that would tend to rebut or to controvert plaintiff's theory that a reasonable time has elapsed, it is incumbent upon the defendant to set them up in his answer. (*Cambridge v. Ramser*, 722.)
48. **GRANT OF RIGHT OF WAY FOR CANALS—CONSIDERATION—DISTRIBUTION OF WATERS ON LANDS OF GRANTOR—DUTY OF GRANTEE.**—A contract granting a right of way through lands in and along a certain slough for the purpose of constructing and maintaining a canal for irrigation purposes, and for storing and conveying water therein over and across said lands, in consideration of the construction and maintenance of certain bridges and a free water right for the water necessary for the irrigation of the lands of the grantor, and providing that for the water actually used for irrigation the grantor shall pay the same rate and be subject to the same rules, terms, and conditions as all other water users, does not impose any duty upon the grantee to raise

CONTRACTS (Continued).

the water by artificial means above the level of the water in the slough that it might by the force of gravity be distributed over said lands. (*Moulton Irrigated Lands Co. v. Jones*, 732.)

49. **TRANSFER OF REAL PROPERTY TO HOLDER OF NOTE—RIGHT TO SELL.**—Where the maker of a promissory note which is past due and unpaid, in consideration for the holder's agreement to refrain for five days from suing upon the note, executes and delivers to such holder of the note a grant deed to certain real estate and also a separate agreement wherein such liability and default is recited, and it is provided that if said indebtedness is not paid within five days thereafter the grantee is authorized to sell the property at either public or private sale without notice, and credit the amount received therefor upon the indebtedness, and there is no intent upon the part of those giving and receiving said deed that it shall be given as security for the payment of the note, upon default in the payment of the indebtedness within the five days the grantee is not obliged to bring an action under the terms of section 726 of the Code of Civil Procedure to realize upon such property, but may proceed in accordance with the written agreement with the grantor. (*Blakeley v. Bryson*, 735.)

See Bonds, 2; Broker's Commissions, 1-3; Corporations, 11, 27, 30, 32; Evidence, 1; Findings, 6; Guaranty, 1, 2; Indemnity, 1; Joint Adventures, 1-3, 5; Landlord and Tenant, 5; Liability Insurance, 2, 3; Mechanics' Liens, 1, 2, 7-9; Minors, 1, 2; Partition, 1; Partnership, 1; Pleading, 1; Promissory Notes, 13, 16; Rescission, 1, 2; Sales, 1; School Lands, 9, 10; Services, 1, 2; Specific Performance, 1, 2; Vendor and Vendee.

CONVEYANCE. See Deeds**CORPORATIONS.**

1. **PLEDGE OF STOCK—ENTRY OF TRANSACTION UPON CORPORATION BOOKS—RIGHTS OF PLEDGEE.**—A person who acquires stock in pledge has the right to compel the corporation to cause the nature of the transaction to be so entered upon its books as to show the names of the pledgor and the pledgee, the number or designation of the shares, and the date of the transfer. (*American T. & B. Co. v. Union S. Co.*, 126.)
2. **INDORSEMENT AND DELIVERY OF CERTIFICATE—VALIDITY OF TRANSFER.**—Under section 324 of the Civil Code, as interpreted by the supreme court, a transfer of stock by indorsement and delivery of the certificate is valid against all but innocent purchasers and transferees in good faith for value, and without notice. Actual notice to such an intending purchaser by one hav-

CORPORATIONS (Continued).

- ing a prior claim upon the stock, even though his claim be not noted in the books of the corporation is sufficient. (Id.)
3. **PURCHASE OF STOCK AT EXECUTION SALE—WANT OF NOTICE OF PRIOR ASSIGNMENT AS PLEDGE—RIGHT TO HAVE SHARES RE-ISSUED.**—A purchaser of stock at an execution sale under his own judgment, without actual or constructive notice of the previous assignment of such stock by the judgment debtor, in whose name it stands on the books of the corporation, to a third person as security for an antecedent indebtedness, takes the stock discharged of the lien of such pledgee, and is entitled to have the certificate of such shares reissued to him as such purchaser. He is a *bona fide* purchaser in good faith, for value, and without notice. (Id.)
4. **EXPIRATION OF TERM—DISSOLUTION.**—A corporation is dissolved at the expiration of the term of its corporate existence. (Nezik v. Cole, 130.)
5. **TERM OF CORPORATE EXISTENCE—POWER TO SHORTEN.**—A corporation has power to shorten the term of its corporate existence by an amendment to its articles of incorporation, even if the practical result of such abbreviation amounts to almost an immediate dissolution. (Id.)
6. **EFFECT OF DISSOLUTION—CAPACITY TO SUE OR BE SUED—ABATEMENT OF PENDING ACTIONS.**—Except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body, or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. (Id.)
7. **SECTION 400, CIVIL CODE, CONSTRUED—NECESSITY FOR SUBSTITUTION OF SUCCESSORS OR REPRESENTATIVES.**—Section 400 of the Civil Code does not have the effect of continuing the existence of a corporation after dissolution so as to render it capable of defending actions in its corporate name. It is, therefore, necessary that, if the action continue at all, its successors or representatives, under section 400, be properly brought in on motion, as provided in section 385 of the Code of Civil Procedure. (Id.)
8. **DISSOLUTION AFTER SERVICE OF PROCESS—INABILITY TO APPEAR—POWER OF COUNSEL TO CONTINUE TO ACT.**—Where, after service of process but prior to appearance, a corporation defendant is dissolved, the subsequent filing of demurrers and answer in its name and purporting to be in its behalf are a nullity; and the

CORPORATIONS (Continued).

action of counsel, who may have had authority to represent such defendant prior to the termination of the period of its legal existence, cannot, so far as that party is concerned, vitalize any proceedings taken in the abated action after the corporation ceases to exist. (Id.)

9. **DISSOLUTION OF CORPORATION DEFENDANT—HOW BROUGHT TO ATTENTION OF COURT—REMEDY OF PLAINTIFF.**—The dissolution or death of a corporation defendant after service of process but prior to appearance, like the death of any other party to a pending action, can only be brought to the attention of the court on proper suggestion made by someone other than the defunct corporation. If the plaintiff intends to secure a judgment, enforceable against the persons who were the directors of the corporation prior to and at the time it ceased to exist, he should have them substituted under section 385 of the Code of Civil Procedure as parties in place of the corporation, after the latter has become *functus officio*. (Id.)
10. **INSTRUMENTALITY OF INDIVIDUAL FOR TRANSACTION OF BUSINESS—LIABILITY OF EACH FOR ACT OF OTHER.**—Where it appears that a corporation is but the instrumentality through which an individual for convenience transacts a particular business, not only equity, looking through form to substance, but the law itself, will hold such corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by acts which bound his corporation. (*Commercial S. Co. v. Modesto Drug Co.*, 162.)
11. **CREATION OF OBLIGATION BY AGENT—FAILURE TO COMPLY WITH BY-LAW—LIABILITY OF CORPORATION.**—Where an obligation is created by the duly authorized agent of a corporation for such corporation, where most if not all of its capital stock is held and owned by one person, and the obligation is one the making of which is within the corporate powers of the corporation, and the act of making it is, therefore, not *ultra vires*, the corporation will be held bound to and liable for the proper execution of the terms of the obligation, notwithstanding it may be shown that the act of making the agreement was not in strict accord with the adopted rules or the by-laws of the corporation with respect to such matters. (Id.)
12. **OFFICER IN GENERAL CONTROL OF AFFAIRS—POWERS CONFERRED BY GENERAL AUTHORITY.**—A corporation is an artificial person, and where it is organized for commercial purposes, its president or general manager, or whoever may be given immediate direction or control of its affairs is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to do

CORPORATIONS (Continued).

some particular act, which is included in the ordinary affairs of such corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation authority to perform such particular act will be inferred from the general authority so given. (Id.)

13. **OSTENSIBLE AUTHORITY OF AGENT—RIGHTS OF THIRD PARTIES.**—Where an officer of a corporation is held out to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. (Id.)
14. **ACCEPTANCE OF BENEFITS — RATIFICATION — ESTOPPEL.**—In this action on two promissory notes executed by the president and manager of the defendant corporation, the act of such corporation in accepting the benefits of the agreement entered into by such president and manager amounted to a consent to all the obligations thereof and if, therefore, there was not thereby in law a ratification of the transaction, the corporation was, by its act of accepting the benefits of the obligation, estopped from denying the binding force thereof upon it. The legal effect of either ratification or estoppel in such a case is precisely the same. (Id.)
15. **EFFECT OF SEAL—PROOF OF AUTHORITY BY PAROL.**—Corporations of all kinds may be bound by their contracts not under seal. The seal of a corporation itself performs no further or greater function than to import *prima facie* verity of the due execution by the corporation of written obligations. The fact that such contracts were duly authorized by the corporation may be shown by parol. (Id.)
16. **ADJOURNMENT OF MEETING—NOTICE TO DIRECTORS.**—Where at a meeting of a board of directors of a corporation regularly held, a majority of the directors being present, action to adjourn to a later date was regularly taken, notice to the directors of the adjourned date was not necessary. (Whitcomb v. Giannini, 229.)
17. **TIME FOR HOLDING MEETING — EFFECT OF HOLDING AT LATER HOUR.**—The fact that the minutes of the meeting on such adjourned date showed that the directors assembled at 1 P. M. instead of 10 A. M., as ordered by the resolution of adjournment previously made, did not affect the regularity of its acts transacted at that meeting. In the absence of a showing to the contrary, it must be assumed that the directors met as soon as a quorum had assembled after the hour of 10 A. M. (Id.)

CORPORATIONS (Continued).

18. **VALID ASSESSMENT—POSTPONEMENT OF SALE—IRREGULARITY—RIGHT OF STOCKHOLDER.**—Where the assessment was not invalid, and the stockholders were given notice of their delinquencies, the passage of a resolution postponing the date of sale and providing for notice of such delinquency at a meeting of the board of directors not regularly noticed, one member of the board being absent, constituted but an irregularity within the provisions of section 347 of the Civil Code which provides that a stockholder, in order to recover stock thus sold for delinquency assessments, must bring his action within six months of such sale. (Id.)
19. **JOINT OWNERSHIP OF STOCK—NOTICE TO RECORD OWNER.**—Even though the corporation had knowledge that the stock was owned jointly by two persons, it was only bound to give notice of the assessment to the one in whose name the stock stood of record on its books. (Id.)
20. **SALE FOR DELINQUENCY—PURCHASE BY DIRECTOR—ACTION TO RECOVER—BREACH OF TRUST.**—In this action brought to recover certain shares of corporate stock alleged to have illegally been made the subject of a sale for delinquent assessment and been bought by one of the directors of the corporation, the facts alleged and proven failed to show a case where the relation of such director to the stockholder was of such a confidential character as to make it a breach of faith or trust should he be permitted to purchase the stock. (Id.)
21. **FOREIGN CORPORATIONS—ACTION ON ASSIGNED CONTRACT—REPEALED CODE SECTION INAPPLICABLE—UNSUPPORTED JUDGMENT.**—In this action in replevin by a foreign corporation on an assigned conditional lease contract covering a piano, the purchaser having defaulted in her payments, sections 405, 406, 408, and 410 of the Civil Code were clearly inapplicable, they having been repealed before the action was instituted and before the assignment of the contract of sale to plaintiff was made; therefore, the findings of the trial court based upon the noncompliance with these repealed sections of the code do not support the judgment of dismissal. (*W. W. Kimball Co. v. Read*, 342.)
22. **ENGAGING IN INTERSTATE BUSINESS—RIGHT TO MAINTAIN OR DEFEND ACTIONS—STATUTE INAPPLICABLE.**—The statute relating to the right of foreign corporations to maintain or defend actions in this state is inapplicable to foreign corporations engaged wholly in interstate commerce and not doing any intrastate business. (Id.)
23. **FILLING OF ORDERS SENT TO OTHER STATE—INTERSTATE COMMERCE.**—Sales, followed by the delivery of the articles in this state, upon orders sent from this state to the foreign corporation

CORPORATIONS (Continued).

in another state, are transactions in interstate commerce and beyond the scope of the statute. (Id.)

24. **ASSIGNMENT INCIDENTAL TO INTERSTATE COMMERCE**.—Where the ordinary business of the foreign corporation was to engage in such interstate transactions, the taking of a single assignment of a conditional sale contract in part liquidation of the indebtedness owing from a local firm to it was not an intrastate transaction, but was a transaction incidental to its interstate business. (Id.)
25. **SALES IN INTERSTATE COMMERCE—RIGHT OF FOREIGN CORPORATION TO ENFORCE PAYMENT**.—When a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. (Id.)
26. **BAR OF STATUTE—BURDEN OF PROOF**.—The burden is on the party pleading the bar of the statute to show that the case comes within its terms. (Id.)
27. **CONTRACT MADE BY OFFICIAL—ADMISSIBILITY OF PAROL EVIDENCE TO HOLD CORPORATION**.—Parol evidence may be invoked to hold a corporation upon a contract entered into by its president or manager in his own name, if it was intended for and inured to the benefit of the corporation and there is anything on the face of the instrument suggesting that it was made for an undisclosed principal. (Swart v. Burr, 442.)
28. **ONE MAN CORPORATIONS—MANNER OF EXECUTING CONTRACTS IMMATERIAL**.—The law is not scrupulously particular in discriminating between the contracts of one who owns practically all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity. (Id.)
29. **EXECUTION OF CONTRACT BY CORPORATE OFFICIAL—EFFECT ON CORPORATION—KNOWLEDGE OF FACTS—ACTION TO ENFORCE—EVIDENCE—INFERENCE**.—In this action against a corporation and its president and general manager to recover a given sum of money and to cancel a certain promissory note, in pursuance of the terms of a written agreement entered into between the plaintiff and such president and general manager, it may reasonably be inferred from the evidence that both parties entered into the contract on the understanding that such president and general manager was the voice of the corporation and that whatever he agreed to would bind the corporation; and it may also be found, as a legal inference from the relations of such president and general manager to the corporation, as shown by the evidence, that the latter is

CORPORATIONS (Continued).

presumed to know of the execution of the contract, and its terms, and that it was the recipient of the consideration. (Id.)

30. **EXECUTORY CONTRACT—SALE UPON CONDITION PRECEDENT—RIGHT OF ELECTION BY PLAINTIFF—LIABILITY OF CORPORATION.**—Where the contract between the plaintiff and such president and general manager with reference to the sale of stock in the defendant corporation was executory, its consummation dependent on the condition precedent that at the expiration of one year plaintiff elect to retain the stock, the corporation, which received the money and the note given in payment with knowledge of the contract, held them subject to the exercise of plaintiff's option, and was bound to repay the money and surrender the note for cancellation upon the plaintiff's decision not to retain the stock. It could not accept the benefits and repudiate the obligations. (Id.)
31. **STOCK SUBSCRIPTIONS—NECESSITY FOR PERMIT.**—Under the Investment Companies Act, prior to the permit from the commissioner of corporations no valid subscription for the corporate stock can be made; and regardless of any attempt on the part of the incorporators to subscribe for stock in excess of the original qualifying shares, there can be no subscription for stock of the corporation. (Nannizzi v. Caprile, 498.)
32. **DISSOLUTION OF PARTNERSHIP—MERGER INTO CORPORATION—ISSUANCE OF PERMIT BY CORPORATION COMMISSIONER—VALIDITY OF AGREEMENT BETWEEN PARTNERS.**—An agreement between partners that the partnership should be dissolved and its property merged with that of other partnerships engaged in the same line of business, in a consolidation under a corporation to be formed, and that the partners should receive respectively stock in the corporation at par, equivalent to their respective interests in the partnership, the members of each partnership as a group to receive such stock of equivalent value to the respective partnership contributions of property to the corporation assets, is a promoters' agreement, binding upon them and good as an offer to the corporation, to become binding on the corporation upon its lawful acceptance of its benefits; and the fact that the commissioner of corporations might never grant his permission to the issuance of the corporate stock has no effect upon the validity of the partnership agreement for dissolution. (Id.)
33. **LIMITATION OF POWERS OF MANAGER—EFFECT OF PUTTING UNDER DIRECTION OF PRESIDENT.**—A general limitation in the resolution passed by the directors of a company that the powers of the manager should be exercised "under the direction of the president" is not to be construed to mean that the sanction of the president to every detail of every transaction is a condition precedent to the authority of the manager to contract. (Simpson v. Malter, 662.)

See Promissory Notes, 3; Street Law, 2.

COSTS.

1. **ITEMS FOR TAKING DEPOSITIONS.**—Items for taking depositions are proper disbursements to put into a cost bill unless they are unnecessary or for some special reason should not be allowed. (*Eades v. Los Angeles Ry. Corporation*, 259.)
2. **DEPOSITION OF PLAINTIFF—PROPER ITEM UPON COST BILL.**—The expense of taking the deposition of the plaintiff is a proper item upon the cost bill and should be allowed where the taking of the deposition was regular in all particulars, as provided by the Code of Civil Procedure, and there is no denial of the allegation in the affidavit that this deposition was necessary for the trial of the action. (*Id.*)
3. **DEPOSITION TAKEN WITHOUT NOTICE—EXPENSE NOT ALLOWABLE.**—A deposition of one of the defendants taken upon stipulation of counsel for the different defendants is not admissible in evidence against the plaintiff where the latter was given no notice of the taking of such deposition and he was not represented at the taking thereof; and the plaintiff may not be charged with the expense of taking such depositions as costs. (*Id.*)

See *Divorce*, 6; *Liability Insurance*, 7.

CRIMINAL LAW.

1. **ORDER DENYING MOTION IN ARREST OF JUDGMENT—APPEAL.**—An appeal does not lie from an order denying a motion in arrest of judgment. (*People v. Williams*, 60.)
2. **LARCENY—IMPEACHMENT OF COMPLAINING WITNESS—CONFLICTING STATEMENTS—PROPER QUESTION.**—In a prosecution for the crime of larceny, the complaining witness, on direct examination, having testified that when the defendant returned to the room in question he asked the defendant to switch on the light, and on cross-examination having been asked if it was not a fact that when the defendant entered the room he switched on the light without being asked by the witness so to do, and the latter having answered in the negative, he was then properly asked, "Did you state at the preliminary that you asked him to turn on the light?" (*Id.*)
3. **PREVIOUS INCONSISTENT STATEMENTS BY COMPLAINING WITNESS—CROSS-EXAMINATION—IMPEACHMENT—FOUNDATION UNNECESSARY.**—In a prosecution for the crime of larceny, the complaining witness having testified on cross-examination that he made no effort to hold the defendant a prisoner in his room after the discovery of the theft, it was proper to ascertain whether or not the witness had made previous inconsistent statements, not only upon that subject, but also relative to the events that occurred in his room and partially detailed upon his direct examination. And it was proper to endeavor to discover that fact from the witness himself, without the

CRIMINAL LAW (Continued).

necessity of first laying the predicate referred to in section 2053 of the Code of Civil Procedure. (Id.)

4. **LAW—BURGLARY—INTENT—EVIDENCE.**—The question of criminal intent is one to be determined by the jury from all the evidence; and where, as in this prosecution for burglary, the evidence produced by the state is believed by the jury and is sufficient to support the verdict, any conflict between the evidence of the defendant and that produced by the state must be resolved against the defendant. (*People v. Wagner*, 248.)
5. **ROBBERY—LIMITATION OF CROSS-EXAMINATION—POWER OF COURT.**—The trial court has the power to exercise a reasonable control over the cross-examination of a witness; and in this prosecution for the crime of robbery the court properly excluded certain questions directed toward the matter of whether the prosecuting witness actually had the coins alleged to have been taken from him, where this matter had already been testified to repeatedly by such witness upon his cross-examination. (*People v. Razo*, 251.)
6. **DISCUSSION OF CASE WITH PROSECUTING WITNESS—STATEMENTS OF DISTRICT ATTORNEY IN ARGUMENT—MISCONDUCT—ERROR NOT PREJUDICIAL.**—In his argument to the jury, statements of the district attorney of his own knowledge, as distinguished from the summing up of the testimony of the prosecuting witness, that such witness had not talked the case over with him, would be misconduct upon his part, but not such prejudicial error as to warrant a reversal of the judgment where the repeated unequivocal statements of the witness were that he did not talk the case over with the district attorney and his testimony was uncontradicted on this point. (Id.)
7. **FORGERY—INTENT TO DEFAUD ESSENTIAL ELEMENT.**—In criminal prosecutions for forgery, the intent to defraud is not only an essential element of the crime of forgery, but is an essential element of every indictment for forgery. (*Carl v. McDougal*, 279.)
8. **ROBBERY—COMPLICITY OF DEFENDANT—EVIDENCE—VERDICT.**—In this prosecution for the commission of a robbery, although the defendant on trial was not present at the time the crime was committed, the jury was justified in concluding from all the surrounding circumstances that he participated in the crime. (*People v. Sartori*, 304.)
9. **WANT OF DIRECT PROOF OF CONSPIRACY—INFERENCE PROPER.**—Under the circumstances which occurred, the jury was justified in drawing an inference of guilt of the crime of robbery, although the prosecution failed to prove a conspiracy through the testimony of the codefendants, who had pleaded guilty, and there was direct uncontradicted evidence in behalf of the defendant that no conspiracy existed. (Id.)

CRIMINAL LAW (Continued).

10. **PROOF OF DETAILED PLAN NOT NECESSARY.**—In a prosecution of several defendants for the commission of a robbery, it is not necessary for the prosecution to prove that a detailed plan of the robbery had been arranged among them. (Id.)
11. **EMBEZZLEMENT—INSTRUCTIONS.**—It is the duty of the court in charging the jury to state to them all matters of law necessary for their information; and in this prosecution an instruction that “If you find from the evidence beyond a reasonable doubt that the defendant did, on or about the date charged in the information, fraudulently appropriate the moneys of” the complaining witness “after said moneys had been intrusted to him and that said moneys were appropriated to the use or purpose other than that for which such property was intrusted to him, you should find the defendant guilty of embezzlement as charged in the information,” was a correct statement of the law, and clearly applicable to the theory of the prosecution as shown by the testimony of the complaining witness. (People v. Fox, 399.)
12. **PROSECUTION ON TWO DIFFERENT CHARGES—EVIDENCE ESTABLISHING EITHER ADMISSIBLE.**—Where a defendant is charged in one count with the embezzlement of a given sum of money and in a second count with larceny of a like sum, any testimony tending to establish the essentials of either offense is proper. (Id.)
13. **ROBBERY—INSTRUCTIONS—EVIDENCE—PREJUDICIAL ERROR.**—In this prosecution for the crime of robbery, the law pertinent to the case, as made by the evidence, was correctly stated to the jury, the court's rulings on the evidence were fairly correct, no prejudicial error in that respect being shown by the record, the defendant was given a perfectly fair trial according to law, and the evidence produced at the trial, having been accepted by the jury, was amply sufficient to justify the verdict. (People v. Scott, 439.)
14. **ABORTION—VERDICT—EVIDENCE—CORROBORATION.**—In this prosecution for abortion the verdict was amply supported by the evidence, and the testimony of the prosecutrix was fully corroborated as required by section 1108 of the Penal Code. (People v. Gilman, 451.)
15. **ADMISSIBILITY OF SURGICAL INSTRUMENTS.**—In a prosecution for abortion it is not error to admit in evidence surgical instruments of a nature to be used in the commission of such an offense where not only is there circumstantial evidence that the defendant used the instruments, but it is admitted by her without objection that she owned them and had them in her possession at the time the alleged offense was committed. (Id.)
16. **SUFFICIENCY OF COMPLAINT—LOTTERY—GAMING.**—While the facts alleged in the complaint under review in this proceeding on *habeas corpus*, in which the petitioner was charged with conducting a lot-

CRIMINAL LAW (Continued).

tery for the distribution of property by chance, raffle, and gift enterprise, did not constitute a lottery within the meaning of section 319 of the Penal Code, the acts with the commission of which the petitioner was charged did constitute a misdemeanor as defined by section 330 of said code, under chapter 10 thereof, entitled "Gaming." (In re Lowrie, 564.)

17. **BANKING GAME DEFINED.**—A banking game is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost. (Id.)
18. **SALE OF CHIPS—BETTING—THROWING OF DICE—BANKING GAME.**—A person engaged in conducting a game wherein, to any one wishing to play the same, he sells ten white chips for a dollar, one or all of which chips each of the purchasers might lay upon the table as a bet and in each case the person conducting the game covering the bet by a like number of chips, he to then throw the dice from the box, followed by the others doing likewise, the result of which determines who loses or wins, the bets being paid accordingly, all chips won by the person conducting the game going into a common fund kept by him, called the bank, and out of which he pays all losses, is conducting a banking game. (Id.)
19. **PLAYING FOR CHIPS REDEEMABLE IN MERCHANDISE—VIOLATION OF STATUTE.**—A person conducting a banking game played for chips, each of which has a definite monetary value and is redeemable at such value by the person conducting the game, in merchandise selected by the winner of the chips, is guilty of an offense under section 330 of the Penal Code. (Id.)
20. **STATUTE NOT REPEALED BY IMPLICATION.**—There is nothing in section 330a of the Penal Code upon which to claim a repeal by implication of the provisions of section 330 of said code. (Id.)
21. **EMBEZZLEMENT—ESSENTIAL ELEMENTS OF OFFENSE—SUFFICIENCY OF INFORMATION.**—The four essential elements of the offense of embezzlement are: (1) That defendant was acting in the capacity of an agent; (2) that he obtained and held the money in his trust capacity; (3) that the money belonged to his principal; and (4) that he converted it to his own use in violation of his trust; and in this prosecution the information sufficiently informed the defendant of all these material elements of the crime charged against him. (People v. Schroeder, 623.)
22. **HOLDING OF MONEY FOR BENEFIT OF PRINCIPAL—INSUFFICIENCY OF ALLEGATION—WAIVER OF DEFECT.**—Even though it does not sufficiently appear from the information in such prosecution that the defendant was holding the money for the benefit of his principal

CRIMINAL LAW (Continued).

at the time of its appropriation by him, where such point is not raised by demurrer, the defect is waived. (Id.)

23. COLLECTION OF MONEY ON ASSIGNED CLAIM—MISAPPROPRIATION OF FUNDS—EVIDENCE—FINDING.—Where the defendant had received, for the purposes of collection only, an assignment of a claim against a business concern for an amount of several hundred dollars, and as the agent and representative of the assignor he collected the claim and deposited the money in the bank to his own account, and when called upon by his principal to deliver the money failed to do so and admitted that he did not have it, and the evidence further disclosed that the amount was no longer to his credit in the bank, the jury was justified in finding that he had appropriated the money for a purpose not in the due and lawful execution of his trust. (Id.)

24. RECEIPT OF PARTIAL PAYMENTS BY AGENT—SEVERAL EMBEZZLEMENTS—IMMATERIAL QUESTION.—In such prosecution it is unimportant to determine whether there had been an embezzlement from time to time of any of the partial payments as they were received by defendant on the collection of the assigned claim. It is sufficient that on and after the date when all of the money had been collected and was payable to his principal, defendant had withdrawn it from the bank on his own account, and under circumstances which made the question of his felonious intent one for the jury to determine. (Id.)

25. EXTORTION—WHO MAY COMMIT—ROBBERY—CONSENT.—Under section 518 of the Penal Code the crime of extortion may be committed by any person, but to constitute the crime of extortion in any case, the taking of the property must be with the consent of the person from whom it is obtained; and it is the fact that the property taken must be with the consent of the person from whom it is obtained that distinguishes the crime of extortion from that of robbery, the latter crime being defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (People v. Peck, 639.)

26. TAKING WITH CONSENT—QUESTION FOR JURY.—In a prosecution for the crime of extortion, the question whether the money was obtained with or without the consent of the person from whom it was taken is a question to be determined by the jury from the circumstances, as shown by the evidence, under which the transaction occurred. (Id.)

27. WHAT CONSTITUTES TAKING WITH CONSENT.—In a legal sense, in a case of this kind, money or property is obtained from a person with his consent if he, with apparent willingness, gives it to the party obtaining it, with the understanding that thus he is to

CRIMINAL LAW (Continued).

save himself from some personal calamity or injury, notwithstanding that within himself he may still protest against the circumstances requiring him to dispose of his money in that way or for such a purpose. (Id.)

28. **PREVIOUS CHARGE OF DEFENDANT WITH ROBBERY—ADMISSION OF COMPLAINT—INSTRUCTIONS.**—In a prosecution for the crime of extortion, the point that the court erred in sustaining the district attorney's objection to the admission in evidence of a prior complaint based upon the same transaction and sworn to by the complaining witness, charging the defendant with the crime of robbery, does not possess much force where such prior complaint was read to the jury, and the jury was not instructed to disregard it, the complaining witness having previously been allowed to say that he swore to the complaint and that he recognized his signature to the document. (Id.)
29. **IMPEACHMENT—CROSS-EXAMINATION—EXTRAJUDICIAL STATEMENTS.**—In such a prosecution, for the purpose of impeachment of the testimony of a witness for the defense, it was proper to permit the district attorney, on cross-examination, to question such witness as to certain statements made by him to the complaining witness, though not made in the presence of the defendant. (Id.)
30. **LIMITED PURPOSE OF TESTIMONY—INSTRUCTIONS—DUTY OF COUNSEL.**—The proper practice in such a case is for the party against whose interests such impeaching testimony is given to request the court to explain to the jury in its charge that such testimony is to be limited in its effect to the specific purpose for which it is allowed, and that the jury are likewise to be restricted in their consideration of it. Where no such instruction is proposed by the defendant, he is without a legal reason for complaining against a failure of the court so to instruct the jury. (Id.)
31. **INSTRUCTIONS—DUTY OF COURT IN CRIMINAL CASES.**—It is the duty of a court in criminal cases to give, *sua sponte*, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases, but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. (Id.)
32. **PREJUDICIAL QUESTIONS—DUTY OF OPPOSING COUNSEL.**—Where a question asked of a witness for the prosecution, whereby it is sought to prove certain extrajudicial statements of a witness for the defense for the purpose of contradicting or impeaching certain portions of the testimony of the latter, is prejudicial to the defendant, counsel for defendant should move the court to strike out the question and specially request the court to instruct or admon-

CRIMINAL LAW (Continued).

ish the jury not to consider it in determining the question of the guilt or innocence of the accused; and his failure to take that course leaves him in no position to complain on appeal. (Id.)

33. MISCONDUCT OF DISTRICT ATTORNEY—REMARKS NOT PREJUDICIAL.—Where in a prosecution for the crime of extortion the defendant tried to prove that the whole affair was a joke, the remarks of the district attorney, "I will make the same kind of a complaint against the defendant, or any other citizen of Plumas County, that perpetrates the same kind of a joke, and I will keep on doing it until the treasury of this county is empty," were not prejudicial to the rights of the defendant, neither did they constitute a threat of any character or anything calculated unjustly to influence the jury against the defendant. (Id.)

34. DISTINCTION BETWEEN LARCENY AND FALSE PRETENSES.—The distinction between larceny and false pretenses is that in larceny the owner of a thing has no intention to part with his property therein to the person taking it, although he may intend to part with possession, while in false pretenses the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. (People v. Schwartz, 696.)

35. OBTAINING MONEY BY FALSE REPRESENTATION — INTENTION OF PERSON PARTY PAYING—NATURE OF OFFENSE.—Where in a prosecution for the crime of grand larceny it is shown by the evidence that the money which the defendant is charged with having unlawfully and feloniously converted to his own use was delivered to him by the complaining witnesses upon the false representation that he had influence with the police commission and that he could obtain for them with the money a license to conduct a certain business, it being also shown that it was not the intention when the money was delivered that it should become the property of the defendant, but was to be paid by him to some unknown and supposed to be actually existing person, but who as a matter of fact was a spurious and mythical individual, the offense is grand larceny and not obtaining money by false pretenses. (Id.)

36. DISTINCTION BETWEEN LARCENY AND FALSE PRETENSES — INSTRUCTION PROPER.—Where possession of money is obtained by fraud, trick, or device, the question whether the crime, if any there be, is larceny or false pretenses often depends upon a nice analysis of facts and legal principles; therefore, in such a case, it is allowable to give an instruction pointing out the distinction between these two classes of crime in order that, if the jurors believe the money was obtained by fraud or trickery, they may acquit the defendant of the charge of larceny if they also believe that the complaining witness intended parting with the title to defendant. (Id.)

CRIMINAL LAW (Continued).

37. **INDICTMENT CHARGING SEVERAL COUNTS—FORM OF VERDICT AND JUDGMENT.**—A separate verdict on each of the ten counts upon which a defendant is convicted constitutes a sufficient compliance with section 954 of the Penal Code, as amended in 1915, whereby it is provided that every "offense upon which the defendant is convicted must be stated in the verdict"; and there is no impropriety in the court pronouncing, and the clerk entering, a separate judgment upon each of the ten verdicts—each judgment being in the form of an indeterminate sentence as provided by the indeterminate sentence law. (Id.)
38. **APPEAL—FAILURE TO FILE BRIEF OR ORALLY ARGUE—AFFIRMANCE OF JUDGMENT.**—Where on appeal from a judgment in a criminal prosecution no brief is filed by either party, nor any appearance made by the appellant at the argument on the day set therefor in the appellate court, it must be assumed that the appeal has been abandoned and the judgment should be affirmed for want of prosecution. (*People v. Martinez*, 746.)
39. **CASE AT BAR—PERUSAL OF RECORD BY APPELLATE COURT—JUST CONVICTION—MODIFICATION OF JUDGMENT.**—On this appeal from a judgment of conviction of statutory rape, although no brief was filed by either party, nor any appearance made by the appellant at the argument on the day set therefor in the appellate court, the cause having been submitted on the record upon motion by the attorney-general, the appellate court carefully perused the pleadings, the evidence, and the instructions, together with the rulings of the court upon the admission and rejection of evidence, and was convinced that the defendant, after a fair and impartial trial, was justly convicted of the crime of statutory rape with which he was charged. The judgment, however, was amended by striking out the words "for the term of not more than fifty (50) years, the exact term to be determined as provided by law." (Id.)
40. **EXTORTION—JUDGMENT—APPEAL—EVIDENCE.**—On appeal from the judgment of conviction in this prosecution for the crime of extortion, abundant evidence was found in the record to support the verdict, no prejudicial error was discovered, and no reason appeared why the conclusion reached in the trial court should be disturbed. (*People v. Frazier*, 762.)

CROPS. See Chattel Mortgages, 1; Contracts, 30.

CUSTOM. See Sales, 1.

DAMAGES. See Alienation of Affections, 14, 18; Contracts, 2, 3, 30; Forceful Entry and Detainer, 3; Landlord and Tenant, 10, 11; Negligence, 17, 24; Vendor and Vendee, 7; Waters and Water Rights, 9-11; Workmen's Compensation Act, 5, 6.

DECLARATIONS. See Alienation of Affections, 6, 18.

DEEDS.

1. **MISTAKE IN NAME OF GRANTEE—REMEDY TO CORRECT.**—Where a mistake has occurred in the name of a grantee in a deed which is essential to a title and which appears both in the deed and the record thereof, a suit to quiet title against the claims of grantee named is essential to the perfecting of the record title; but where the deed contains no mistake, the only mistake being in the recording of it, the owner cannot in good faith swear that there is an outstanding claim and the necessity for maintaining such an action disappears. (*Robben v. Benson*, 204.)

2. **DELIVERY.**—Where after recordation a deed is mailed by the recorder to the grantee, such delivery is sufficient and title can then vest only in such grantee. (*Rossiter v. Schultz*, 716.)

See Contracts, 28; Mortgages, 1; Tax Sales, 3; Waters and Water Rights, 2.

DEFAULT.

1. **RELIEF FROM—DISCRETION—APPEAL.**—Applications to be relieved from an order or judgment by default are addressed to the sound discretion of the trial court, and its action upon such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion. (*Stone v. McWilliams*, 490.)

2. **CASE AT BAR—DISCRETION NOT ABUSED.**—In this action the court did not abuse its discretion in setting aside the defendant's default where he made a seasonable application to be relieved from his default and filed an affidavit of merits showing a good defense, it appearing that he was over seventy years of age, totally blind, illiterate and unable to write his name, and wholly unfamiliar with court proceedings, and that he neglected to make seasonable answer to the complaint by reason of what he understood the deputy sheriff to advise or inform him he might safely do at the time that officer made service. (*Id.*)

3. **MOTION TO SET ASIDE—DISCRETION OF TRIAL COURT—ACTION AGAINST CORPORATION—SERVICE OF SUMMONS ON SECRETARY—EXTENSION OF TIME TO PLEAD.**—The granting of motions to set aside defaults is largely in the discretion of the trial court, and its action will not be disturbed unless there has been an abuse of such discretion; and in this action to foreclose a mortgage it would have been an abuse of discretion to have granted the motion of the defendant corporation to set aside a default entered by the clerk of the court against it after its time to appear in the action had fully expired, no order having been made extending its time to plead, notwithstanding an order was made giving the secretary of the corporation personally, he being the individual upon

DEFAULT (Continued).

whom service of summons on the corporation was made, an extension of time to plead. (*Mercantile Trust Co. v. Railroad Co.*, 512.)

See Appeal, 18; Judgments, 2; Parties, 4.

DEFENSE. See Fraud, 5; Injunction, 2; Mechanics' Liens, 12.

DELIVERY. See Deeds, 2; Sales, 1.

DEMAND. See Forcible Entry and Detainer, 2.

DEPOSIT. See Leases, 1-3.

DEPOSITIONS.

1. **INSUFFICIENT COMPLAINT—DEMURRER SUSTAINED—REFUSAL OF DEFENDANT TO ANSWER INTERROGATORIES—POWER TO PUNISH FOR CONTEMPT.**—The superior court has jurisdiction to adjudge a defendant guilty of contempt for his refusal to answer interrogatories in a proceeding regularly instituted by the plaintiff to take his deposition under the provisions of section 2021 of the Code of Civil Procedure, after the sustaining of a general demurrer to the complaint with leave to file an amended complaint, the time within which to file the same not having expired, and prior to the exercise by plaintiff of such right. (*Rosbach v. Superior Court*, 729.)

2. **BRINGING OF SUIT—WHAT CONSTITUTES—RIGHT TO TAKE DEFENDANT'S DEPOSITION.**—The filing of the complaint constitutes the bringing of the action, and the plaintiff's right to have the defendant's deposition taken depends not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file. (*Id.*)

See Costs, 1-3.

DISBARMENT. See Attorney at Law, 1.

DISCHARGE. See Bankruptcy, 2-5.

DISCRETION. See Appeal, 19; Bankruptcy, 7, 8; Default, 1-3; Divorce, 6; Estates of Deceased Persons, 6.

DISMISSAL. See Appeal, 10; Guaranty, 1; Guardian and Ward, 2; Jurisdiction, 1; New Trial, 2.

DIVORCE.

1. **VIOLATION OF COURT ORDER BY WIFE—DISMISSAL OF APPEAL.**—An appeal by the wife from a judgment granting the husband a divorce and awarding him the custody of the minor children will not be dismissed because of the violation by the wife of the terms of an order of the trial court regarding the custody of such children. (*Dupes v. Dupes*, 67.)
2. **FINDINGS—EVIDENCE—CORROBORATION.**—In this action for divorce, the findings of the trial court were responsive to the pleadings and were sufficiently supported by substantial evidence and, where necessary, were corroborated as required by section 130 of the Civil Code, and the trial judge was fully warranted in his view of the merits of the case. (*Id.*)
3. **EXTREME CRUELTY—WHAT CONSTITUTES—CONCLUSION OF TRIAL COURT—APPEAL.**—The question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal. (*Id.*)
4. **ABSENCE OF ONE SPOUSE WITHOUT KNOWLEDGE OR CONSENT OF OTHER.**—Whether or not any specific absence of one spouse from the family home without the knowledge or consent of the other constitutes extreme cruelty, depends entirely upon the facts and circumstances of each particular case. (*Id.*)
5. **EXTREME CRUELTY IS QUESTION OF FACT.**—Whether or not any particular acts or course of conduct constitutes extreme cruelty within the meaning of the law is a question of fact to be deduced from all the circumstances of each case. (*Id.*)
6. **GRANTING OF ALIMONY, COUNSEL FEES, AND COSTS—DISCRETION OF TRIAL COURT.**—The granting of alimony, counsel fees, and costs in actions for divorce is a matter which lies largely in the discretion of the trial court, and it must be made to clearly and affirmatively appear upon the face of the entire record in the case that this discretion has been abused before the appellate tribunal will be moved to interfere. (*Webster v. Webster*, 772.)
7. **DENIAL OF ALIMONY—APPEAL—ABUSE OF DISCRETION.**—Upon this appeal from the portion of a judgment of divorce, on the grounds of extreme cruelty and failure to provide, refusing to allow the plaintiff alimony, the appeal having been taken on the judgment-roll alone, the appellate court could not say from the record before it that the trial court abused its discretion. (*Id.*)

ELECTION OF REMEDIES. See *Contracts*, 35, 36; *Vendor and Vendee*, 2.

ELECTIONS. See *Municipal Corporations*, 7.

EMBEZZLEMENT. See Criminal Law, 11, 12, 21, 24.

EMPLOYER AND EMPLOYEE. See Workmen's Compensation Act, 4.

EQUITY.

1. **JURISDICTION—ADJUSTMENT OF ALL RIGHTS.**—Where equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation. (*Barber v. Superior Court*, 221.)
2. **ESTATES OF DECEASED PERSONS—OBTAINING OF FINAL DECREE THROUGH FRAUD—EXPIRATION OF TIME FOR RELIEF IN PROBATE COURT.**—Where the decree settling a final account and distributing the estate of a deceased person has been fraudulently obtained but no opportunity remains by appeal or motion to obtain relief therefrom, the powers of a court of equity are at once available. (*Id.*)
3. **ACCOUNTING—JURISDICTION OF EQUITY COURT.**—Where an action is brought in equity to set aside a decree settling a final account and distributing the estate of a deceased person on the ground that it was obtained through fraud, it being alleged that the final account of the administrator was false and fraudulent, and that he failed to account for a large amount of assets of the estate, and falsely credited himself with sundry sums for which in fact he was not entitled to receive credit, and an accounting is prayed, such accounting may be made in the equity court; and the payment of the money found to be due into the hands of the new representative of the estate by the defaulting representative will constitute a protection against all claimants. (*Id.*)

See Contracts, 1; Jurisdiction, 3, 4; Mutual Benefit Associations, 2; Rescission, 2, 3.

ESCHEAT. See Banks and Banking, 1-3.

ESTATES OF DECEASED PERSONS.

1. **ACTION AGAINST REPRESENTATIVE OF ESTATE OF DECEASED ADMINISTRATOR—PERFORMANCE OF OFFICIAL DUTY—PRESUMPTION.**—In this action against the representative of the estate of a deceased administrator for moneys collected by the latter as such administrator and alleged not to have been accounted for, it must be presumed, in view of the absence of positive evidence to the contrary and the lapse of the great number of years, that the deceased administrator performed his official duty, that he acted honestly and in good faith, and that if the money was due, it was paid. Such presumption is not affected by the provisions of the

ESTATES OF DECEASED PERSONS (Continued).

statute in relation to the administration of estates. (*Pratt v. Pratt*, 261.)

2. **RIGHT OF ADMINISTRATOR TO SETTLE WITH SOLE HEIR WITHOUT ADMINISTRATION.**—Where there was no real estate, no creditors, and no controversy as to the heirs, the father of the deceased, between whom and the administrator a relation of trust and confidence existed, being the sole heir, it cannot be said that it was the duty of the administrator in any event to pursue the course indicated by sections 1443, 1622, 1636, and 1665 of the Code of Civil Procedure. While that would have been the more regular procedure, and would have afforded him greater security, there was nothing unreasonable or illegal in his settling with his father without the formality of the ordinary administration of estates, his determination being subject to review by the court at the instance of any interested party. (*Id.*)
3. **LACHES — WHAT CONSTITUTES — LAPSE OF TIME.**—Laches, unlike the statute of limitations, is not a mere matter of time. It involves and implies some other circumstance or circumstances that would render inequitable the enforcement of the claim, such as a change in the relation of the parties or the condition of the property that is deemed a justification for the denial of any relief. The great lapse of time, especially if the claimant has knowledge of the existence of his right, however, is often held sufficient to create the presumption or implication of another fact of an equitable nature, and thus to justify a decision against the claimant. (*Id.*)
4. **RIGHT OF HEIR TO COMPEL SETTLEMENT OF ESTATE.**—An heir has the right to invoke the aid of the court to compel the administrator to settle the estate within the statutory time. (*Id.*)
5. **PAYMENT OF CLAIM—DEATH OF WITNESSES—EFFECT OF LAPSE OF TIME—EVIDENCE—FINDING.**—The facts that the only parties who could have positive knowledge of the payment or nonpayment of the money from the administrator to the father were dead, and that but slight evidence with reference thereto was offered on both sides, justified the trial court in its conclusion that owing to the great lapse of time evidence could not be secured as to the payment or nonpayment of the claim. (*Id.*)
6. **LACHES—DISCRETION OF TRIAL JUDGE.**—There is no hard-and-fast rule as to the length of time that would bar such an action as this. Much depends upon the peculiar circumstances of the case, a large discretion being confided to the trial judge, and the disposition of an appellate court is and should be to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done. (*Id.*)

ESTATES OF DECEASED PERSONS (Continued).

7. **REVOCATION OF PROBATE OF WILL — PERSONS INTERESTED — SUFFICIENCY OF PETITION.**—A petition for the revocation of the probate of a will which alleges that the petitioners are the son and daughter of the deceased and that they, with two other persons named, constitute and are the sole heirs at law of said deceased, sufficiently shows that the petitioners are persons "interested" within the meaning of section 1327 of the Code of Civil Procedure. (*Estate of Mauvais*, 779.)
8. **PETITIONERS NOT PERSONS INTERESTED—RIGHT TO RAISE ISSUE BY ANSWER.**—If for any reason not apparent upon the face of a petition for the revocation of the probate of a will the petitioners are not persons "interested" within the meaning of section 1327 of the Code of Civil Procedure, notwithstanding their status as heirs at law of the deceased, it is proper to challenge the right of the petitioners to wage the contest by answer creating an issue as to the necessary interest of the petitioners. (*Id.*)
9. **UNDUE INFLUENCE—INTENTION OF TESTATRIX—STATEMENTS NOT EVIDENCE.**—In a will contest on the ground of undue influence, declarations of the testatrix prior to and subsequent to the date of the will in issue that she intended treating all her children alike in the final disposition of her property are not of themselves sufficient to establish undue influence. (*Id.*)
10. **OPPORTUNITY TO INFLUENCE TESTATRIX—EVIDENCE OF UNDUE INFLUENCE.**—Mere proof of opportunity to influence a testatrix's mind, even when coupled with an interest or motive so to do, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act. (*Id.*)
11. **PROOF OF GENERAL INFLUENCE.**—A case of undue influence is not made out by proof of a general influence over the affairs of the testatrix without proof that such influence was brought to bear upon the testamentary act. (*Id.*)
12. **PROOF OF UNDUE INFLUENCE BY INDIRECT EVIDENCE.**—While the exercise of undue influence may be shown by indirect evidence, such evidence must do more than raise a suspicion; it must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made. (*Id.*)
13. **CASE AT BAR—INSUFFICIENT PROOF OF UNDUE INFLUENCE.**—In this proceeding for the revocation of the probate of a will the legal inferences, proper to be drawn from the circumstantial evidence relied upon by the contestants, amounted in weight and

ESTATES OF DECEASED PERSONS (Continued).

value to no more than to create the suspicion or surmise that the will in probate was procured through the undue influence of the proponent; and the proof relied upon was insufficient as a matter of law to upset the will in contest. (*Id.*)

See Equity, 2, 3.

ESTOPPEL. See Alienation of Affections, 2; Attachment, 2; Contracts, 20; Corporations, 14; Mechanics' Liens, 13; Municipal Corporations, 5.

EVICTIOIN. See Leases, 6, 7, 12, 13.

EVIDENCE.

1. **ASSUMPSIT—ELECTRICITY FURNISHED UNDER CONTRACT—CORRESPONDENCE AS EVIDENCE OF REASONABLE VALUE.**—In an action upon a common count for the reasonable value of electric current delivered by plaintiff to the defendant, correspondence between the parties authorizing the plaintiff to deliver electricity and to charge therefor at a stated rate is admissible to prove that the rate charged was reasonable, although such correspondence proved a contract price. (*San Joaquin L. & P. Co. v. Barlow*, 241.)
2. **EXCLUSION OF EVIDENCE—FORMAL RULING AND EXCEPTION IMPLIED.**—In this action to recover the reasonable value of electric current delivered by plaintiff to the defendant, although no question was formally propounded to the witness on cross-examination, as to the reasonableness of the rate charged, with a ruling thereon from which under the statute an exception would be implied, the statements of the court to the effect that the only issue was as to the amount of current furnished, and that it did not see that there was any open question as to the reasonableness of the rate, to which counsel for defendant, without any direct exception, responded that on the ruling of the court he would not ask any further questions on cross-examination as to the reasonableness of the rate, was equivalent to such formal ruling and exception. (*Id.*)
3. **CURTAILMENT OF CROSS-EXAMINATION—PREJUDICIAL ERROR.**—In such action, the refusal of the court to permit the only witness produced by plaintiff on the subject of the reasonable value of the electricity furnished to defendant to be cross-examined for the purpose of testing his qualifications as a witness on the question of reasonable value, and for the purpose of showing that the charge was not reasonable, was prejudicial error. (*Id.*)
4. **INSTRUMENT ACKNOWLEDGED OUTSIDE STATE—SUFFICIENCY OF OBJECTION TO.**—An objection to the admission in evidence of a power of attorney executed in England on the ground that it was

EVIDENCE (Continued).

not properly acknowledged must be specific in order to put the person offering it on proof of its proper acknowledgment. An objection to its admission on the ground that it was not acknowledged as required by the laws of this state is not sufficient. (*Pratt v. Pratt*, 261.)

5. PROPER QUESTION—IMPROPER MATTERS IN ANSWER—REMEDY.—

Where a proper question is put but the answer thereto contains matters which are not properly admissible, the proper and only remedy of the party aggrieved is to move to have such improper matter stricken out. A mere objection to such testimony is not sufficient to preserve the right of the objecting party to have the question raised reviewed on appeal. (*De Bock v. De Bock*, 283.)

6. OBJECTION TO TESTIMONY—FAILURE TO STRIKE OUT FULLY—

WHEN NOT ERROR.—Error of the court in failing to fully strike out all the testimony to which an objection was made can have resulted in no prejudice to the party making the objection where the same fact as shown by the testimony not stricken out was testified to by the witness without objection. (*Id.*)

7. REFUSAL OF RIGHT TO CROSS-EXAMINE PLAINTIFF—APPEAL—ER-

ROR.—It cannot be said on appeal that the trial court committed error in refusing the request of the defendants to cross-examine the plaintiff in reference to a conversation with her husband where the purpose or purport of the question to be asked was not made known to the trial court and the defendants did not ask the question of the witness directly that it might be made a proper subject of review. (*Id.*)

8. OBJECTIONS TO TESTIMONY BY TRIAL JUDGE.—Except in unusual

cases, the trial judge should not make an objection to a question asked and then sustain his own objection. (*Id.*)

9. JUDGMENT-ROLL IN PRIOR ACTION—PROOF OF OWNERSHIP OF NOTE.

In an action by the owner of a promissory note against a bank to recover the amount of the note, which had been deposited with such bank for collection, which amount the bank had paid to the payee named therein instead of to the plaintiff, the judgment-roll in a prior action by plaintiff against such payee and the bank, brought after the delivery of such note to the bank for collection and the payment of the proceeds to the nominal payee, and in which it was determined that plaintiff was the owner of such note, while not competent evidence to show that the bank had notice of plaintiff's beneficial interest in such note at the time it received the note, made the collections, and paid over the proceeds, was competent evidence, and a determination of the fact that plaintiff was the owner thereof. (*Bell v. German American Trust etc. Bk.*, 402.)

EVIDENCE (Continued).

10. **OBJECTIONS—TIME.**—An objection to a question after it is answered comes too late. (*People v. Gilman*, 451.)

See Alienation of Affections, 3-7, 13-16, 18; Appeal, 1, 12, 13, 17, 23, 24, 27, 28; Attorney at Law, 1; Contracts, 8, 25, 27, 28, 30, 31; Corporations, 15, 20, 26, 27; Criminal Law, 2-5, 8-10, 12, 15, 23, 28-30; Divorce, 2; Estates of Deceased Persons, 10-13; Findings, 1, 7; Fraud, 1, 2; Gifts, 1, 3; Guardian and Ward, 1; Landlord and Tenant, 6, 7; Mechanics' Liens, 1; Names, 1-5; Negligence, 4, 5, 7, 21-29; Promissory Notes, 6, 15-19; Red-light Abatement Act, 1-4; Sales, 1, 2; Slander, 3; Specific Performance, 1, 3; Street Law, 1, 2, 5, 9; Title, 1; Vendor and Vendee, 5, 6; Waters and Water Rights, 6, 7; Workmen's Compensation Act, 4, 6; Written Instruments, 1.

EXCEPTIONS. See Evidence, 2.

EXECUTION.

1. **PREMATURE MOTION TO SET ASIDE RETURN OF SALE—RIGHT TO RE-NEW MOTION.**—In an action to foreclose a mortgage, an order denying a motion, made prior to the return of sale by the sheriff, to vacate such return and directing a new order of sale to be issued, does not render the matter *res adjudicata* as to a second motion made for the same purpose after such return of sale has been made. (*Johnson v. Nelson*, 113.)
2. **UNSATISFACTORY RETURN BY SHERIFF—SETTING ASIDE EX PARTE.**—A trial court, having had brought to its attention that the sheriff, as its officer, has made an equivocal and unsatisfactory return upon an order of sale issued to him in an action to foreclose a mortgage, and that the same was unsatisfied, has full power *ex parte* to set aside such return and direct a new order of sale to be issued and executed. (*Id.*)

EXECUTION SALES. See Corporations, 3.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons, 1.

EXPENSES. See Liability Insurance, 7.

EXTORTION. See Criminal Law, 25, 26, 28, 29, 40.

FALSE PRETENSES. See Criminal Law, 34.

FINDINGS.

1. **TRIAL—EVIDENCE—ADMISSION WITHOUT OBJECTION.**—If evidence, not otherwise admissible, is admitted without objection, a finding based thereon is proper. (*Smith v. Golden State Syndicate*, 346.)

FINDINGS (Continued).

2. **CONSTRUCTION OF TO UPHOLD JUDGMENT.**—The entire findings and conclusions of law are to be construed to uphold the judgment when, from the facts found, other facts may be inferred which will support the judgment. (*Terry v. Southwestern Building Co.*, 366.)
3. **WANT OF FINDINGS—REVERSAL OF JUDGMENT.**—A judgment will not be reversed for want of a finding unless it appears there was no evidence, or lack of evidence which required the court to make a finding in favor of the appellant. (*Id.*)
4. **INTERPLEADER—SUBSTANTIAL FACTS ADMITTED BY PLEADINGS—FINDING UNNECESSARY.**—Where the plaintiffs in a complaint in interpleader allege that they do not know the actual amounts due the various claimants, or whether or not their claims of lien are valid, and such lien claimants respectively in their cross-complaints allege that the labor and material furnished went into the plaintiffs' building, and that there were due, owing, and unpaid, after deducting all just credits and offsets, the sums claimed by them, and the plaintiffs did not deny these allegations but stipulated that their complaint should stand as their answer to the cross-complaints respectively, the substantial facts were thus admitted by the pleadings, and no finding was necessary. (*Id.*)
5. **FINDINGS OUTSIDE ISSUES—JUDGMENT.**—The action of the trial court in going outside the issues in its findings is immaterial, in so far as the integrity of the resultant judgment is concerned, where the judgment is amply supported by other findings against which such criticism may not be made. (*Spencer v. Deems*, 601.)
6. **AGREEMENT TO ACCEPT AND PAY FOR WINE—WHAT IMPLIED.**—A finding that the purchaser, which was a company, agreed to accept certain wine and to make payment therefor at a given price per gallon implies a valid and binding agreement by the company to so purchase the wine, made by an agent authorized to act for the company. (*Simpson v. Malter*, 662.)
7. **APPEAL—FACTS INFERRED TO SUPPORT JUDGMENT.**—Whenever from the facts found by the trial court other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment an appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering its judgment. (*Id.*)
8. **FACTS IN ISSUE.**—Findings should be confined to the facts in issue, the province of the court being to determine but not to raise issues. (*Rich v. Moss Beach Realty Co.*, 742.)

See Appeal, 3, 8, 24, 26; Contracts, 26; Corporations, 21; Divorce, 2; Leases, 5, 10; Liability Insurance, 4; Mechanics' Liens, 3, 11; Negligence, 5; Title, 2.

FIXTURES. See Landlord and Tenant, 5.

FORCIBLE ENTRY AND DETAINER.

1. **ESSENTIAL ELEMENTS.**—Under section 1159 of the Code of Civil Procedure, a person is not guilty of forcible entry where his entry upon the premises is not accompanied by any kind of violence or circumstances of terror, and he does not turn out by force, threats, or menacing conduct the party in possession. (*Edwards v. Bodkin*, 405.)
2. **UNLAWFUL ENTRY—NECESSITY FOR DEMAND FOR POSSESSION.**—Even though a person's entry upon the premises is an unlawful entry made during the absence of the occupant, an action of forcible detainer cannot be maintained against him, under subdivision 2 of section 1160 of the Code of Civil Procedure, unless the former occupant has made demand for the surrender of the premises and he, for the period of five days, has refused to surrender the same. (*Id.*)
3. **POSSESSION NOT RECOVERED—DAMAGES.**—In an action in forcible entry or forcible detainer the plaintiff is not entitled to recover damages unless he recovers the possession of the premises in controversy. (*Id.*)

See Receivers, 1, 2.

FOREIGN CORPORATIONS. See Corporations, 21, 22, 25, 26.

FORFEITURE. See Contracts, 11, 13-15, 24.

FORGERY. See Slander, 1, 2.

FRAUD.

1. **PRESUMPTION AGAINST FRAUD—EXERCISE OF DUE DILIGENCE—PLEADING.**—The presumption is always against fraud, and one who seeks relief against the effects of fraud must allege it and prove it by clear proof and satisfactory evidence. He must clearly show that he did not discover the existence or commission of the alleged frauds within a reasonable time before the action was begun, that he proceeded promptly upon such discovery, and that his failure to make the discovery sooner was not due to his own lack of diligence. All this must be shown, not merely by a bare statement of such conclusions, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking an earlier discovery. (*Security Commercial etc. Bank v. Seitz*, 353.)
2. **WANT OF PLEADING AND PROOF—DENIAL OF RELIEF.**—Where the persons seeking relief on the ground of fraud alleged not to have been discovered until more than three years after it was committed

FRAUD (Continued).

not only fail to allege why they did not sooner discover the fraud or that they exercised diligence in seeking a discovery, but wholly fail to make any offer of proof upon either of these matters, the trial court is fully justified in denying their relief upon this plea. (Id.)

3. **FRAUDULENT REPRESENTATIONS—UNTRUTH OF STATEMENTS—PLEADING.**—In an action for damages for fraudulent representations, it is essential that the statements made by the defendant be alleged to be untrue. An inference is not a sufficient allegation of falsity. (McDougall v. Roberts, 553.)
4. **INDICTMENT OF PLAINTIFF—INFLUENCE OF DEFENDANTS TO PREVENT—WANT OF ALLEGATION OF FALSITY.**—Allegations that the defendants represented to plaintiff that he was about to be indicted by the grand jury and that they had great influence with the United States district attorney, and could, through him, either cause or prevent an indictment being found against plaintiff, are insufficient to state a cause of action for fraud where it is not alleged that such statements were untrue. (Id.)
5. **DEFENSE—PLEADING.**—Fraud is not available as a defense where such an issue is not tendered by the pleadings. (Ambrose v. Hammond Lumber Co., 597.)

See Contracts, 18, 19; Judgments, 3; Street Law, 5; Trade Names, 4; Vendor and Vendee, 1-3.

GIFTS.

1. **INTENT OF DONOR—FINDING—EVIDENCE.**—In this action to recover a sum of money alleged to be due from defendant to the estate of plaintiff's testate, there was sufficient evidence to support the finding of the trial court to the effect that it was the testate's intent to make an absolute gift of the money to defendant. (Id.)
2. **PAYMENT OF INTEREST—RETURN OF PRINCIPAL—ORIGINAL INTENT NOT DEFEATED.**—Where such intent to make an absolute gift existed, it would not be defeated by the further fact that the donor required of the donee that he pay her interest on the sum given during her lifetime, nor even by the fact that he gave her back some of the principal at her request. (Id.)
3. **ADMISSIBILITY OF DECLARATIONS OF DONOR.**—In determining the intent of the donor, declarations made by her both before and after the transaction are admissible as tending to show a gift. (Id.)

GUARANTY.

1. **CONSIDERATION—DISMISSAL OF PENDING ACTION.**—Dismissal of an action to foreclose a mortgage given as security for the payment of a promissory note constitutes a sufficient consideration for a

GUARANTY (Continued).

written agreement by the title owner of the property about to be foreclosed guaranteeing the payment of that and another promissory note executed by the defendants to plaintiff's assignor.—(Security Commercial etc. Bank v. City, 853.)

2. **CONSIDERATION IMPLIED FROM WRITING.**—Where such contract of guaranty was in writing, the writing itself imports a consideration. (Id.)

3. **CONSTRUCTION—CHANGE IN SUBJECT TO WHICH GUARANTY APPLIES—RELEASE OF GUARANTOR.**—The obligations of a guarantor are to be strictly construed; and where, upon default in the payment of rent, the landlord by summary proceedings takes possession of the leased premises and, without the knowledge or consent of the guarantor of the lease, subdivides it, thereby rendering it less rentable, of lower value and incapable of being rented as a single tenement, the guarantor is released. (Solomon v. Cawston Ostrich Farm, 465.)

See Mortgages, 2; Promissory Notes, 12.

GUARDIAN AND WARD.

1. **CONFLICTING EVIDENCE—FINDING—APPEAL.**—Where, in a proceeding for the appointment of a guardian, the evidence is conflicting, but enough appears to support the findings of the trial court that the person in question is not incompetent and that no fraud had been practiced upon her, the judgment will be affirmed on appeal. (Estate of King, 307.)

2. **DEATH OF ALLEGED INCOMPETENT—DISMISSAL OF APPEAL.**—If, on such an appeal, the statement contained in a letter presented to the appellate court before which such appeal is pending to the effect that the alleged incompetent had died pending the appeal, and asking that the matter be submitted, is sufficient as a suggestion of death, the ordinary course would be to dismiss the appeal. The effect of such a dismissal would be the same as an affirmance of the judgment. (Id.)

HIGHWAYS. See Bonds, 2.

HUSBAND AND WIFE. See Trusts, 1.

INCOMPETENT PERSONS. See Guardian and Ward, 1.

INDEMNITY.

CONSTRUCTION OF POLICY.—A contract of indemnity is to be strictly construed, and the contract of indemnity measures the rights of the parties thereto, and, consequently, the liability of the indemnitor. (Tulare Co. Power Co. v. Pacific S. Co., 315.)

INDEMNITY INSURANCE.

DEATH OF EMPLOYEE WHILE ENGAGED IN OTHER THAN BUSINESS OF INSURED—NONLIABILITY OF INSURANCE COMPANY.—Under a policy purporting to furnish insurance covering injuries to employees only while engaged in and about the concern of a certain electrical establishment, the insurance company is not liable in damages for the death of a chauffeur in the employ of the insured, where he was killed while conveying to her home, at the request of the manager of the establishment, a young lady who formerly had been employed by such establishment, such service being purely gratuitous and without any obligation in any wise connected with the business then being transacted by the electrical establishment or in connection therewith. (*Western Indem. Co. v. Industrial Acc. Com.*, 487.)

INFERENCES. See Findings, 7.

INJUNCTION.

1. **MAGNITUDE OF INTERESTS INVOLVED—EFFECT ON POWERS OF TRIAL COURT.**—While the amount of damages that would accrue should a preliminary injunction be issued in a given case is a proper matter for the consideration of the lower court in exercising its discretion in granting or refusing to grant the temporary injunction, the size of the interest involved is not a factor in determining the power of such court to hear and decide the matter. (*Yolo Water etc. Co. v. Superior Court*, 332.)
2. **EXISTENCE OF GOOD DEFENSE—JURISDICTION.**—The existence of facts constituting a good defense on the merits to an application for a writ of injunction does not oust the court in which such action is pending of the power to hear and decide the case. (*Id.*)
See Jurisdiction, 4; Trade Names, 2-6.

INSTRUCTIONS. See Criminal Law, 11, 30-32, 36; Negligence, 21; Slander, 2; Workmen's Compensation Act, 12.

INSURANCE. See Liability Insurance, 1, 2, 5, 7-10.

INTENT. See Criminal Law, 4, 7, 34, 36; Gifts, 1, 3; Promissory Notes, 16.

INTEREST. See Appeal, 2; Gifts, 2; Joint Adventures, 6; Liability Insurance, 7, 8; Promissory Notes, 8.

INTERPLEADER.

WHEN MAINTAINABLE—STATUS OF PLAINTIFF.—The plaintiff in an interpleader suit cannot have a judgment in his favor nor urge the

INTERPLEADER (Continued).

claims of certain interpleaded defendants against others, but must at all times maintain the position of a disinterested stakeholder, which alone gives him the right to maintain such a suit. (Terry v. Southwestern Building Co., 366.)

See Finding, 4.

INTERSTATE COMMERCE. See Corporations, 22-25.

INTERVENTION. See Banks and Banking, 3, 4; Quieting Title, 2.

INVESTMENT COMPANIES ACT. See Corporations, 31.

JOINT ADVENTURES.

1. **PARTNERSHIP DISTINGUISHED.**—While a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. In a partnership, each partner embraces the character of both principal and agent, being the former when he acts for himself in the partnership; while in a joint adventure, no one of the parties thereto can bind the joint adventure. (Keyes v. Nims, 1.)
2. **RIGHTS OF ADVENTURERS—RULES GOVERNED BY.**—In an action to secure the dissolution of an alleged partnership between the parties and for an accounting, it is immaterial whether the relation between the parties is that of a partnership or a joint adventure, or a limited partnership. The resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships. (Id.)
3. **RIGHT OF MEMBERS TO SUE AT LAW.**—One party to a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure, but the right thus to sue at law does not preclude a suit in equity for an accounting. (Id.)
4. **ACTION FOR DISSOLUTION AND ACCOUNTING—PARTNERSHIP PLEADED—RELIEF GRANTED.**—Where, in an action by a joint adventurer for a dissolution of an alleged partnership and for an accounting, the evidence is sufficient to warrant the trial court in finding and adjudging that the plaintiff is entitled to one-third of the profits realized from the joint enterprise which was the subject of the agreement between him and the defendant and to an accounting for the purposes of determining the extent or amount of such profits, such judgment and decree will be sus-

JOINT ADVENTURES (Continued).

tained on appeal notwithstanding the complaint alleges that the relation between the parties was a partnership whereas it was a joint adventure. (Id.)

5. **EFFECT OF CONTRACT TAKING IN NEW PARTY.**—Where two persons enter into a partnership agreement for the purpose of carrying on a certain designated business, but subsequently a third person, with the consent of the two original members, is given a one-sixth interest in the partnership by each of such members, the purpose of the partnership not being changed, the taking of such third person into such partnership does not constitute the making of such an agreement as would operate to supersede and abrogate the original agreement between the parties thereto. (Id.)
6. **ACTION FOR DISSOLUTION AND ACCOUNTING—RIGHT OF PLAINTIFF TO INTEREST.**—In an action by one party to a joint adventure for a dissolution of the relationship between the parties and for an accounting, it is not error to include in the judgment interest on the amount of money awarded to the plaintiff from the date of the sale of the subject matter of the adventure by the defendant, where the only question to be determined by the court is the extent of the plaintiff's interest, that is, whether it is one-half or a one-third interest, the facts governing which are known to the defendant. (On petition for rehearing.) (Id.)

JOINT TENANCY. See Partition, 1.

JUDGMENTS.

1. **TRUSTS—HOLDING PROPERTY AS SECURITY—DETERMINATION OF OWNERSHIP IN PREVIOUS ACTION—NEW TRIAL—JUDGMENT NOT RES ADJUDICATA.**—In an action in equity to have it adjudged that the legal title to the property in dispute was held by defendant's intestate in trust and as security for the debt of the husband of the plaintiff to said intestate, a judgment rendered in a previous action brought by a third party against all the parties to the case at bar, and relating to the same property, is not *res adjudicata* in the case at bar where a new trial was granted in such prior action, notwithstanding that in such prior action judgment was rendered against plaintiff in the case at bar and she did not make a motion for a new trial nor appeal from the judgment therein. (Murphy v. Bridge, 182.)
2. **EFFECT OF DEFAULT—RELIEF PERMISSIBLE.**—A default admits the material allegations of the complaint, and no more; and the relief to be awarded to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any case, the court may grant him any relief consistent with

JUDGMENTS (Continued).

the case made by the complaint and embraced within the issues. (Williams v. Reed, 425.)

3. **FRAUD ON COURT—POWER TO SET ASIDE.**—A court has inherent power to set aside a judgment for fraud upon the court, and the right to so act or grant relief is not derived from section 473 of the Code of Civil Procedure. However, a fraud that will render such relief available does not include a judgment irregularly obtained upon a fraudulent claim or by false testimony. A judgment may be unjust, inequitable, and erroneous without being fraudulent or subject to be set aside by a court of equity. (Id.)
4. **SALE OF PARTNERSHIP PROPERTY—DIRECTION AS TO GIVING OF NOTICE IMMATERIAL.**—In an action for an accounting after dissolution of a partnership, that portion of an interlocutory judgment directing the sheriff how and when to give the notice of sale of the partnership property is unnecessary and may be disregarded. (Id.)
5. **INSUFFICIENCY OF NOTICE—VALIDITY OF SALE—REMEDY OF PARTY AGGRIEVED.**—Insufficiency of the notice of sale is not ground for setting aside an order confirming a sale made pursuant to a direction in a judgment or decree. The remedy of the party aggrieved under these circumstances is against the officer. (Id.)
6. **FAILURE TO DETERMINE DEFENDANTS' RIGHTS—PLAINTIFF NOT CONCERNED.**—Where in the action against the substituted defendants the court rendered judgment that plaintiff take nothing, it is no concern of the plaintiff that the court failed to determine the right of the defendants to the fund in question. (Israel v. Superior Court, 711.)

See Appeal, 14; Bankruptcy, 6; Banks and Banking, 4; Contracts, 15, 16, 19; Corporations, 6, 21; Criminal Law, 37; Evidence, 9; Findings, 3, 5; Joint Adventures, 4; Liability Insurance, 6-8; Parties, 4; Tax Sales, 2; Waters and Water Rights, 5.

JURIES AND JURORS. See Alienation of Affections, 13.

JURISDICTION.

1. **UNAUTHORIZED SUIT—REMEDY OF ONE AGGRIEVED.**—If the district attorney, or anyone else, brings an action that the law does not permit him to bring, the court in which it is brought has jurisdiction to dispose of it. The proper procedure of the one aggrieved is by motion to dismiss, and not by application for a writ of prohibition. (Yolo Water etc. Co. v. Superior Court, 332.)
2. **JURISDICTION OF SUPERIOR COURT—POWER OF LEGISLATURE TO TAKE AWAY.**—The jurisdiction of the superior court is conferred by the constitution and cannot be taken away by any act of the

JURISDICTION (Continued).

legislature. Jurisdiction is the power to hear and determine, and does not depend upon the regularity of its exercise, nor upon the rightfulness of the decision made by the court. (Id.)

3. **INJUNCTION PROCEEDINGS AGAINST PUBLIC UTILITIES—EFFECT OF CONSTITUTIONAL PROVISIONS.**—The superior court has jurisdiction to hear and determine a suit brought in the name of the people against a public utility to enjoin it from committing a public nuisance. The equity powers of that court, as conferred by section 5 of article VI of the constitution, are not limited by the provisions of section 23 of article XII of the constitution, which states what are public utilities and provides for their control and regulation by the Railroad Commission. (Id.)
4. **POWER OF RAILROAD COMMISSION TO AVAIL ITSELF OF COURT PROCESSES—NOT INCONSISTENT WITH RIGHT IN OTHERS.**—The powers conferred by the constitution upon the Railroad Commission to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law is not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against the public utilities. This express power to avail itself of court processes and writs was conferred upon the commission so that its power in this regard might not be questioned in any litigation. (Id.)

See Bankruptcy, 9; Banks and Banking, 2; Contempt, 1, 2; Injunction, 1, 2; Judgments, 3; New Trial, 4; Prohibition, 2, 4; Receivers, 4, 5.

LACHES. See Estates of Deceased Persons, 3, 6; Pleading, 6; Trusts, 7.

LANDLORD AND TENANT.

1. **ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEES.**—Where tenants hold under a mere naked assignment of the lease, their liability is, as to the landlord, limited to their occupancy of the premises and terminates with their abandonment of possession. (*Chase v. Oehlke*, 435.)
2. **EXPRESS COVENANT TO PAY RENT—OBLIGATIONS OF ASSIGNEES.**—Where, however, the assignees by express terms in writing covenant and agree to pay the rent reserved in the lease, it presents two sets of obligations and rights: one comprising those due to the relation of landlord and tenant based upon privity of estate, and the other due to privity of contract by the terms of which the obligations of assignees of the lease is to be measured. (Id.)
3. **REPUDIATION OF LEASE BY ASSIGNEES—RIGHT OF LESSOR TO SUE—PARTIES.**—Where the assignees of a lease have upon sufficient consideration assumed and agreed to pay the rent, their obliga-

LANDLORD AND TENANT (Continued).

tion is identical with that of the original lessee upon his express covenant so to do, and when they repudiate the lease and abandon the premises, the lessor is entitled to stand upon the terms of the contract made with the lessee and his assigns for the lessor's benefit and sue thereon to recover the rent which they agreed to pay, in the same manner and to the same extent as though they had been the original obligors under the terms of the lease, regardless of whether or not the lessor was a party to the assignment contract. (Id.)

4. **ABANDONMENT OF PREMISES BY TENANT—RELEASE FROM FURTHER LIABILITY.**—The rule that where a tenant abandons leased property and repudiates the lease, if the landlord takes unqualified possession thereof, the tenant, upon the theory of a rescission, is released from further liability, is not applicable where the tenant repudiates the lease and abandons the demised premises and the landlord, without taking unqualified possession of the premises, endeavors, without success, to obtain a new tenant. (Id.)
5. **EXPIRATION OF TERM—RIGHT OF LANDLORD TO FIXTURES NOT REMOVED—WAIVER.**—The right of a landlord to claim fixtures put in the leased building by the tenant but not removed during the term of the original lease may be waived and the tenant by contract granted the right to remove the fixtures during the term of the new lease. (*McComish v. Kaufman*, 507.)
6. **EXTENSION OF TIME FOR REMOVAL—EVIDENCE—FINDING.**—In this action to recover possession of certain property alleged to have been wrongfully removed by the tenant after the expiration of the time within which such removal might legally have been effected, the testimony of the defendant covering his conversations and dealings with the plaintiff, though denied in part by the latter, was sufficient to support the finding of the trial court that plaintiff agreed that defendant should have thirty days in addition to the time given by his prior lease and notice within which he might remove the property, and that defendant did remove the property prior to the agreed date. (Id.)
7. **ADMISSIBILITY OF PAROL EVIDENCE—WAIVER OF OBJECTION.**—Where in such action the defendant was permitted, without objection from the plaintiff, to offer parol evidence in support of his claim that the plaintiff by oral agreement extended the time within which the property might be removed from the leased premises, the written lease covering the further term having contained no such provision, the admissibility of such testimony cannot be questioned for the first time on appeal. (Id.)
8. **RETAKEING OF POSSESSION BY LESSOR—LEASE NOT TERMINATED.**—Where the original lessor takes possession of the leased premises and relets the same under an express agreement that he is doing so

LANDLORD AND TENANT (Continued).

for the benefit of the original lessee and his assignees and that his act in so doing and the reletting of the premises by him is not in any manner to relieve the lessees or any of them of liability for the rent of the premises as provided in the lease, the original lease is not hereby terminated. (*Gates v. Kehlet*, 738.)

9. **ASSIGNMENT OF LEASE—AGREEMENT WITH ASSIGNEE AS TO RETAKING—ORIGINAL LESSEE NOT RELIEVED FROM LIABILITY.**—The fact that the agreement as to the terms and conditions of the lessor's retaking of the possession of the leased premises and attempt to relet the same was made with the assignees of the lease, who were then in possession of the premises, and not with the original lessee, did not relieve the original lessee from further liability for the rent provided in the lease where under the terms of the original lease and of the assignments thereof the original lessee was expressly made liable for the whole unpaid portion of the rentals due under the original lease. (*Id.*)
10. **ACCEPTANCE OF POSSESSION BY LESSOR—SUBSEQUENT RELET-
TING—RIGHT TO RECOVER LOSS FROM ORIGINAL LESSEE.**—Where a landlord accepts the possession of rented premises from his tenant upon the understanding and agreement that he does so for the latter's benefit and in order to relet the premises on the latter's behalf, he has a right to recover from the tenant and from whom-
ever else has made himself liable therefor the difference between what he has been able, in good faith, to let the property for and the amount agreed to be paid under the terms of the original lease. (*Id.*)
11. **PLEADING—RECOVERY OF "RENT" OR "DAMAGES."**—Where the original lessee, in an action to recover such difference, states the facts upon which he relies for a recovery, his right of recovery is not affected by the fact that he does not denominate the amount he claims to be due in the body or prayer of said complaint as rent or damages. (*Id.*)

See Guaranty, 3; Leases; Negligence, 11.

LARCENY. See Criminal Law, 12, 24.

LAW OF CASE. See Appeal, 7; Quieting Title, 1.

LEASES.

1. **LANDLORD AND TENANT—DEPOSIT OF SECURITY—TERMINATION OF
LEASE—RIGHT TO RETURN OF DEPOSIT.**—Where money is deposited as security for the payment by the lessee of the rent, upon the termination of the lease the lessee is entitled to a return of the sum deposited, less the amount of the rent due and unpaid at the time of the termination. (*Curtis v. Arnold*, 97.)

LEASES (Continued).**2. PAYMENT OF BONUS FOR LEASE—RIGHT OF LESSEE TO RECOVER.—**

If the sum is paid by the lessee as a bonus, as an independent consideration, to induce the lessor to make the lease, a cancellation of the lease by the lessor for any cause which justifies the act will not entitle the lessee to receive back any part of the sum so paid, in the absence of some stipulation in the lease permitting her to do so. (Id.)

3. AMOUNT PAID AT TIME OF EXECUTION OF LEASE—TERMINATION OF LEASE FOR NONPAYMENT OF RENT—RIGHT OF LESSEE TO RECOVER MONEY—CONSTRUCTION OF AGREEMENT.—Under the terms of a lease providing that "for and in consideration of the sum of three thousand dollars, the receipt whereof is hereby acknowledged," the lessor "agrees to make and enter into, and does make and enter into," a lease of a certain building to be erected for a period of ten years from and after the completion of the building at a stated total rental payable in given monthly installments, the first month's rent being free, nothing being said as to the amount of rent to be paid for the last five months of the term, and that in the event of the termination of the lease prior to the expiration of the ten-year term, for any reason or cause, except a breach of covenant by the lessee, the lessor will pay to the lessee the sum of three thousand dollars, with interest, provided, however, that if such termination shall occur during the last five months of said term, the amount so payable shall be reduced at the rate of \$925 per month for each of said months as shall have expired prior to said termination, and providing further that if the lessee shall comply with the terms, conditions, and covenants of this lease, he shall have the use of the premises free during the last five months of the term, said free rent being conditioned upon the full performance of all the terms of said lease by the lessee during the entire ten-year term, upon the lessees moving out of the premises less than four years after the completion and taking possession thereof, following notice from the lessor to pay the monthly installment of rent then due and unpaid within three days or deliver possession of the premises, such lessee is not entitled to recover any portion of the fund paid to the lessor at the time of the execution of the lease. (Id.)

4. PROVISION AS TO REPAIRS—MAKING OF BY LESSEE—RIGHT TO RECOUP LOSSES OUT OF RENT.—Under a lease providing that the lessor, at her own cost and expense, shall repair, or cause to be repaired, any defects in said premises due to construction which shall appear during the first twelve months after the completion and acceptance of the building, the lessee is not entitled to recoup her losses of money for repairs made by her after the expiration of such twelve-month period from the rent of the premises as such rent becomes due. (Id.)

LEASES (Continued).

5. **LANDLORD AND TENANT—DEPRIVATION OF ENJOYMENT OF SUBSTANTIAL PORTION OF DEMISED PREMISES—CONSTRUCTION OF FINDINGS.**
In this action by a tenant to have a lease declared rescinded, the effect of the finding of the trial court "that plaintiff has not suffered, or sustained, any material or substantial damage in any amount of money, or thing whatever, by reason of all, or any, of the acts complained of by plaintiff, and found by the court to have been done by defendant," when read with the finding as to the acts done, or suffered to be done, by the defendant, was that plaintiff was not deprived of a *substantial* as distinguished from an insignificant or inconsequential portion of the demised premises, or, in other words, deprived of the beneficial enjoyment of a *substantial* portion thereof. (North Pac. S. S. Co. v. Terminal Inv. Co., 182.)
6. **NECESSITY FOR ACTUAL OUSTER—WHEN RULE INAPPLICABLE.**—Where the lessee is not deprived of the beneficial enjoyment of a substantial portion of the leased premises, the rule that "it is not necessary that there should be an actual ouster, to constitute an eviction, for any act of the lessor which results in depriving the lessee of the beneficial enjoyment of the premises will constitute an eviction," does not apply. (Id.)
7. **OBSTRUCTION OF PASSAGEWAY BY OTHER TENANTS—TRESPASS.**—In this action by a tenant to have a lease declared rescinded, the acts of defendant's tenants, who occupied the adjoining premises, in obstructing the passageway, or "open space," leading to plaintiff's premises by hanging and displaying therein a café lunch-sign, two feet wide, and about six feet in height, during certain hours of the day, amounted to no more than a mere trespass. (Id.)
8. **TRESPASS NOT BREACH OF COVENANT.**—No acts of molestation, even if committed by the landlord himself, or by a servant at his command, amount to a breach of the covenant of quiet enjoyment and possession, unless they are more than a trespass. (Id.)
9. **PASSING TRESPASS—EVICTION.**—A mere passing trespass cannot operate to so oust a tenant of his possession as to amount to an eviction or a dispossession. (Id.)
10. **INDUCEMENT FOR MAKING LEASE—OBSTRUCTION OF PASSAGEWAY—FINDINGS NOT INCONSISTENT.**—In this action by a tenant to have the lease declared rescinded, the findings of the trial court to the effect that the continued existence of the passageway, or "open space," leading to the leased premises was a material part of the consideration for the obligation of plaintiff under said lease, and constituted a material inducement to plaintiff to enter into the same, and that the obstruction of such passageway for a period of not exceeding twenty-one days did not work a failure of any material or substantial part of the consideration to plain-

LEASES (Continued).

tiff for its lease, and that plaintiff had sustained no substantial or material injury or damage by reason of the obstruction, or by reason of any of the acts complained of, were not inconsistent and contradictory. (Id.)

11. **RESCISSI0N—REVIVAL BY LESSOR.**—The principle of law that after the lessee has determined to rescind the contract, and given notice to the lessor that the lease is ended by reason of the latter's failure to comply with its terms, the termination of the lease is complete, and the lessor cannot thereafter by any act of its alone renew the lease by removing the cause of the alleged eviction by the lessor, is applicable only where the lessee has good cause for rescission. (Id.)
12. **EVICTI0N—RIGHT OF RESCISSI0N.**—An eviction must be established before the right of rescission of the lease springs into being. (Id.)
13. **WANT OF EVICTI0N—ABATEMENT OF TRESPASS—EVIDENCE.**—In this action by a tenant to have a lease declared rescinded, the trial court having found that an eviction had not occurred by reason of the acts of trespass committed by the other tenants, was right in permitting the defendant to show the circumstances under which the trespass was abated. (Id.)

See Contracts, 35; Corporations, 21; Landlord and Tenant, 1, 2, 5, 8, 10; Rescission, 3; Taxation, 1.

LEGISLATURE. See School Lands, 10.**LIABILITY INSURANCE.**

1. **ASSUMPTION OF CONTROL OF LITIGATION—WAIVER OF NOTICE OF ACCIDENT.**—The conditions of a liability insurance policy that "upon the occurrence of an accident, the assured shall give immediate written notice thereof with the fullest information obtainable at the time," being intended primarily to afford opportunity to the insurer promptly to take charge of a defense, are waived where the insurer does assume control of the litigation growing out of the accident. (Tulare Co. Power Co. v. Pacific S. Co., 315.)
2. **ASSUMPTION OF CONTROL BY INSURED—AFFIRMANCE OF JUDGMENT ON APPEAL—VIOLATION OF POLICY.**—It cannot be said that the insured violated a condition of the policy by taking complete control of the motion for a new trial in an action brought against it for damages, where counsel for the insurer was present at and participated in the trial and the judgment in such action was affirmed on appeal. (Id.)
3. **PARTIAL CONTROL BY INSURED—WANT OF INTERFERENCE—WAIVER OF BREACH.**—In the absence of some complaint that the attorneys for the insured, who had been permitted to take part in the case, interfered with the insurer's conduct of the defense in the action

LIABILITY INSURANCE (Continued).

for damages, the fact that the latter did not have full and exclusive control of the defense did not militate against the rule that by assuming such control they waived the prior breach of conditions by the insured. (Id.)

4. **ACTION UPON POLICY—PERFORMANCE—WAIVER OF PERFORMANCE—CONSTRUCTION OF FINDINGS.**—Where, in an action upon a liability insurance policy, both the fact of performance of all the conditions of the policy by the insured and the fact of waiver of performance of the conditions of the policy by the insurer, with the facts and circumstances constituting such waiver, are alleged in the complaint, a finding that plaintiff "performed all the conditions of said policy" may be considered as surplusage, if the evidence justifies the further finding of waiver on the part of defendant. The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment. (Id.)
5. **ACCIDENT DURING LIFE OF POLICY.**—Where the accident in question happened during the period of the policy it was immaterial that the installation of the wires which caused the accident occurred two months prior to the issuance of the policy, or that the insurer may not have learned of the date of installation of the plant until after the trial of the action growing out of the accident. (Id.)
6. **PAYMENT OF JUDGMENT.**—The judgment against the insured having become final and a lien upon its property, the payment thereof partly by the insured personally and the balance by the purchaser of its property, who withheld the amount paid from the purchase price, constituted payment within the provision of the policy that "No action shall lie against the company for any recovery under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue." (Id.)
7. **INTEREST ACCRUING PENDING APPEAL—RECOVERY BY INSURER.**—Interest on the judgment recovered against the insured from the date of its entry and pending an appeal therefrom does not constitute "expense" incurred in defending the action, or "costs," within the meaning of the provision in a liability insurance policy that, in the event of any suit brought against the assured to enforce a claim for damages covered by the policy, the insurer "will defend such suit, whether groundless or not, in the name and on behalf of the insured," and that "the expense incurred by the company in defending such suit, including costs, if any, taxed against the assured, will be borne by the company whether the judgment is for or against the assured." (Id.)

LIABILITY INSURANCE (Continued).

8. **INTEREST RECOVERABLE.**—An insured who pays a judgment for the full amount limited in a liability policy indemnifying against actual loss, or a judgment for a smaller amount than such limited sum, can recover the sum with interest only from the time of such payment. (Id.)
9. **RECOVERY OF ATTORNEYS' FEES.**—The insured is not entitled to recover attorneys' fees paid to its counsel where the insurer notified the insured that it would defend the action, and did defend it, and the participation therein by the insured's attorneys was by the insurer's permission and was not required by the terms of the policy. (Id.)
10. **VENUE OF ACTION.**—In this action upon a liability insurance policy, the court having found from the facts set forth in the affidavit filed by plaintiff that the contract was made in Tulare County and was to be performed therein, and the business of plaintiff having been conducted in that county and the liability of the defendant under the policy having arisen therein, the court properly denied the defendant's motion for a change of venue to the county where it maintained its principal place of business. (Id.)

LIENS.

1. **MORTGAGE LIEN—POSSESSORY LIEN FOR REPAIRS—SUPERIORITY.**—The possessory lien of one who repairs personal property, at the request of the owner or legal possessor thereof, is superior to the lien and right of possession of the owner of a pre-existing chattel mortgage. (*Kranzthor v. Al. G. Faulkner*, 441.)
2. **MORTGAGES—OWNER AS MORTGAGEE.**—A party cannot hold a mortgage on and the legal title to the same property at the same time. (*Standard Auto Sales Co. v. Lehman*, 763.)
3. **HYPOTHECATION—TITLE IN ANOTHER.**—A person cannot hypothecate property where the title is in another. (Id.)
4. **DELIVERY OF AUTOMOBILE TO VENDEE—LIEN FOR PURCHASE PRIOR.**—Where the vendor of an automobile retains title in himself, the possession of the machine being delivered to the vendee, he does not have a lien thereon for the unpaid balance of the purchase price. (Id.)
5. **PLEDGE—VENDOR NOT IN POSSESSION.**—Such vendor was not secured by a pledge of said property. In order to have such security he must have been the pledgee and in possession of the property. (Id.)
See Bankruptcy, 5, 6; Mechanics' Liens.

LOTTERIES. See Criminal Law, 16.

MALICE. See Alienation of Affections, 10.

MANDAMUS.

ERRORS IN TRIAL OF ACTION NOT REVIEWABLE.—In such proceeding in *mandamus* to compel the court to render judgment against the original defendant, the appellate court is not concerned with the alleged errors in the trial of the action against the substituted defendants. (*Israel v. Superior Court*, 711.)

See Pleading, 4.

MASTER AND SERVANT. See Negligence, 15.

MECHANICS' LIENS.

1. **ACTION TO FORECLOSE—COMPLETION OF CONTRACT—EVIDENCE.**—In an action to foreclose a mechanic's lien, testimony that work or labor ceased on the building in question on a given date, that the last work necessary to be done on the building to complete the contract was performed on that date, and that the building was then completed and nothing more was to be done thereon, is equivalent to testimony that the contract was completed on that date, and from it the trial court was justified in so finding, if it believed such testimony. (*Mott v. Wright*, 21.)
2. **CESSATION FROM LABOR—CONSTRUCTIVE COMPLETION.**—The cessation from labor by reason of the actual completion of the contract is not the cessation of labor which, under section 1187 of the Code of Civil Procedure, itself constitutes a constructive completion of the building or contract. (*Id.*)
3. **CONFLICTING EVIDENCE—FINDING—APPEAL—INVALID CLAIMS.**—In an action to foreclose a mechanic's lien, testimony tending to show that the building was completed at a later date than that testified to by the witnesses for the defendants, and as found by the court, merely raises a conflict in the evidence upon that issue, and the trial court having resolved such conflict in favor of the defendants, the appellate court is concluded by its findings, and claims of lien not filed within ninety days of the date of completion, so found, are ineffective. (*Id.*)
4. **TIME FOR FILING CLAIMS—SUBSTANTIAL COMPLETION.**—All that the statute requires, to fix the time from which the right of lien claimants to file their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion, and, in this case, the testimony shows that there was such a completion, if not more than that. (*Id.*)
5. **ONE HUNDRED AND TWENTY DAY RULE—APPLICATION OF.**—The rule as to the one hundred and twenty days' period after cessation from labor within which claims may be filed has no application where there is an actual completion. (*Id.*)

MECHANICS' LIENS (Continued).

6. OCCUPATION OF BUILDING DURING PERFORMANCE OF WORK—PRESUMPTION OF COMPLETION.—Where the lien claimants do all their work after the occupation or use by the owner takes place, or while the owner is occupying or using the building, this occupation or use is not such as raises a conclusive presumption of completion under the statute. (Id.)
7. PERSONAL LIABILITY OF OWNER—WANT OF PRIVITY.—Where there is no contract, either express or implied, between the owner and the lien claimants for material furnished and labor performed, such owner cannot be held personally liable therefor. (Id.)
8. PERFORMANCE AT REQUEST OF CONTRACTOR—PLEADING—RECOVERY IN QUANTUM MERUIT.—Where, in an action to foreclose a mechanic's lien, it is alleged in the complaint that the labor bestowed upon and the materials furnished for the building were so bestowed and furnished in pursuance of the contract between the contractor and the owner and were bestowed and furnished at the instance of the contractor, and no issue as to the reasonable value of the labor and the materials is submitted in the form of a common count, no recovery can be had against the owner in *quantum meruit*. (Id.)
9. APPORTIONMENT OF PRICE—CONTRACT SEVERABLE.—Where the agreed price for performing a given contract is apportioned to each item according to the value thereof and not as one unit, such contract is not an entire one, but is severable. (On petition for rehearing.) (Id.)
10. CONSTRUCTION OF BUILDING—EXECUTION OF BOND IN FAVOR OF OWNERS ONLY—PROPERTY NOT RELIEVED FROM LIABILITY.—A building contractor's bond not conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work, and which is not by its terms made to inure to the benefit of any and all persons who might perform labor upon or furnish materials to be used in the work described in the contract, as provided by section 1183 of the Code of Civil Procedure, but which, on the other hand, contains the express condition that no right of action shall accrue upon or by reason thereof to or for the use or benefit of any other person than the obligee therein named and that the obligation of the surety is and shall be construed strictly as one of suretyship only, is not such a bond as relieves the owner from liability of his property for liens under the statute. (*Terry v. Southwestern Building Co.*, 366.)
11. INTERPLEADER BY OWNERS—NONPAYMENT OF CLAIMS—SUFFICIENCY OF FINDINGS—JUDGMENT.—In an action in the nature of suit in interpleader by the owners of real property upon which a building had been erected and against the building contractor, its

MECHANICS' LIENS (Continued).

- surety, and numerous lien claimants, a conclusion of law "that said lien claimants are entitled to enforce liens upon the real property described in plaintiff's complaint for the payment of the several amounts found due them respectively as hereinbefore set forth" amounts to a finding of fact that such sums are due, although included in the conclusions of law; and in such a case the judgment will not be reversed for want of a direct finding that such sums are owing and unpaid. (*Id.*)
12. **TIME FOR FILING—CESSATION OF WORK.**—A claim of lien by a subcontractor not filed until more than nine months after the constructive completion of the contract, there having been a complete cessation and abandonment of the work by the contractor, is not filed in time. (*Pence v. Martin*, 626.)
13. **FAILURE TO FILE NOTICE IN TIME—ACTION TO FORECLOSE—DEFENSES.**—In an action to foreclose a mechanic's lien, the defendants are not estopped from setting up as a defense the plaintiff's failure to file the notice of claim of lien within the statutory period, where there is no showing that they had by act or representation willfully and fraudulently led him to forego his rights of lien. (*Id.*)
14. **NOTICE OF NONRESPONSIBILITY—ACKNOWLEDGMENT OF NOT SUFFICIENT.**—The acknowledgment and filing for record of a copy of notice of nonresponsibility does not constitute a sufficient compliance with the requirements of section 1192 of the Code of Civil Procedure, which requires the owner to "file for record a verified copy of said notice." (*Pasqualetti v. Hilson*, 718.)
15. **CONSTRUCTION OF SECTION 1192, CODE OF CIVIL PROCEDURE.—STRICT COMPLIANCE ESSENTIAL.**—Section 1192 of the Code of Civil Procedure, as amended in 1911, was intended to require a strict compliance with its provisions on the part of owners of property upon which work or labor was to be done or materials furnished in order to relieve themselves from responsibility for the value of the same under the provisions of chapter 2 of title IV of the Code of Civil Procedure, relating to the liens of mechanics, materialmen, and laborers. (*Id.*)
16. **"VERIFICATION"—MEANING OF TERM.**—The term "verified" wherever used in the Code of Civil Procedure requires the oath or affidavit of the party executing the instrument in order to amount to a sufficient verification thereof. (*Id.*)
17. **ACTUAL NOTICE OF CLAIM OF NONRESPONSIBILITY—COMPLIANCE WITH STATUTE NOT WAIVER.**—The facts that notice of nonresponsibility was posted upon the property upon which labor was performed and materials furnished and that the lien claimant had

MECHANICS' LIENS (Continued).

actual notice of such claim do not render the filing of such notice in the form required by the statute immaterial. (Id.)

See Bonds, 1.

MEDICAL TREATMENT. See Workmen's Compensation Act, 2.

MINORS.

1. **DISAFFIRMANCE OF CONTRACT.**—Under section 35 of the Civil Code, contract for the purchase of corporate stock, when made by minors under the age of eighteen years, may be disaffirmed by them and they thereby relieved from any further burdens under them. (Winkler v. Los Angeles Investment Co., 408.)
2. **CONTRACT MADE BY FATHER WITHOUT KNOWLEDGE OR CONSENT OF MINORS—RIGHT OF DISAFFIRMANCE.**—Where the father of certain minors to whom had been delivered certain shares of stock to be invested and reinvested by him for the purpose of providing means for their education, with the consent of the donor disposed of all the securities held by him, and, without the knowledge or consent of the minors, purchased certain shares of stock in a given corporation, the names of the minors being signed to the contracts of purchase and certain promissory notes by the father without their knowledge or consent, and the stock certificates being issued in their names at the father's request and without their knowledge or consent, such contracts must be deemed the contracts of the father, rather than of the minors, and therefore not subject to disaffirmance by them. (Id.)

MISCONDUCT. See Criminal Law, 6, 33; Workmen's Compensation Act, 9

MISREPRESENTATIONS. See Attorney and Client, 1; Rescission, 1, 2, 4.

MISTAKE. See Deeds, 1.

MORTGAGES.

1. **CONSTRUCTION OF DEED—FORECLOSURE.**—A deed absolute on its face may be treated as a mortgage and foreclosed as such if that was the intention of the parties thereto. (Murphy v. Hellman Commercial etc. Bk., 579.)
2. **CONSTRUCTION OF SECTION 726, CODE OF CIVIL PROCEDURE—APPLICATION TO GUARANTORS AND SURETIES.**—The provision of section 726 of the Code of Civil Procedure that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property" was enacted for the benefit of the principal debtor and to relieve

MORTGAGES (Continued).

him from liability from a multiplicity of actions, and does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract between the two existing obligations—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations. (Id.)

3. PROSECUTION OF SUIT AGAINST PRINCIPAL DEBTOR—RIGHT TO BRING SUBSEQUENT ACTION AGAINST THIRD PARTIES ON COLLATERAL.

The fact that a creditor has commenced and prosecuted to final judgment an action against the principal debtor will not constitute a defense to a subsequent action against third parties to foreclose on collateral given by them as security for the payment of the debt. (Id.)

4. PARTIAL RELEASE—DEDUCTION OF MARKET VALUE.—Generally, a mortgagee, with notice of several successive alienations of parts of the mortgaged premises primarily liable for the payment of the debt, cannot release a portion of the mortgaged premises for less than the market value of the property so released and charge the remaining portion of the premises with the payment of the balance of the mortgage debt without deducting therefrom the market value of the part released. (Thompson v. Thomas, 588.)

5. AGREEMENT THAT MORTGAGEE MAY GRANT PARTIAL RELEASE—PUBLIC POLICY.—Where, however, a mortgage contains a provision that “the mortgagor agrees that the mortgagee may at any time without notice release portions of said mortgaged premises from the lien of this mortgage without affecting the personal liability of any person for the payment of said indebtedness, or the lien of this mortgage upon the remainder of the mortgaged premises, for the full amount of said indebtedness then remaining unpaid,” the mortgagee has a right to grant a release of a portion of the mortgaged premises for less than the market value of the property so released and to hold the remainder of the property for the balance of the mortgage debt, and such a provision is not contrary to public policy. (Id.)

See Contracts, 36; Execution, 1, 2; Guaranty, 1; Liens, 2; Vendor and Vendee, 1, 2.

MOTIONS. See Execution, 1; Res Judicata, 1.

MOTIVE. See Alienation of Affections, 8.

MOTOR VEHICLE ACT. See Negligence, 8, 29, 30.

MUNICIPAL CORPORATIONS.

1. **SAN FRANCISCO—EMPLOYMENT OF CITY ARCHITECT—FIXING COMPENSATION ON PERCENTAGE BASIS.**—The board of public works of the city and county of San Francisco has authority to employ a "city architect" to prepare plans and otherwise render services in connection with the erection of city buildings and to fix his compensation at a given percentage of the cost of construction, payable as the work progresses. Such person does not become an employee or an officer of the city, in the ordinary sense, nor is he engaged in an employment requiring a fixed monthly compensation. (*Reid v. Boyle*, 34.)
2. **SAN FRANCISCO—ERECTION OF SCHOOLHOUSE—EMPLOYMENT OF ARCHITECT.**—Under the charter of the city and county of San Francisco, the board of public works is not bound to engage architects exclusively as "employees," at stated monthly salaries, or at a given *per diem*, but may engage an architect by special contract, to prepare plans and specifications for use in connection with the erection of a schoolhouse at his own time and expense, for a stipulated fee based on the cost of the construction work to be planned and supervised by him. (*Miller v. Boyle*, 39.)
3. **ACCOMPLISHMENT OF GIVEN RESULT—MEANS NOT PRESCRIBED—ADOPTION OF REASONABLE MEANS—POWERS OF MUNICIPAL BOARDS.**—When the charter permits a certain result to be accomplished, but does not prescribe the means, any reasonable, or suitable, means may be adopted. A municipal board not only has the powers expressly enumerated in the organic act, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly, or impliedly, prohibited. (*Id.*)
4. **EMPLOYMENT OF ARCHITECT UPON PREVAILING TERMS—REASONABLE MEANS—LETTING OF CONTRACT TO LOWEST BIDDER—CHARTER NOT VIOLATED.**—The employment by the board of public works of the city and county of San Francisco of a duly authorized architect to prepare plans and specifications for use in connection with the erection of a schoolhouse, upon the terms and conditions prevailing in the community, constitutes the adoption of a reasonable and suitable means of accomplishing the required result, and is not in violation of the provisions of the charter requiring the awarding of contracts to lowest bidders. (*Id.*)
5. **RECEIPT OF BENEFITS BY MUNICIPALITY—ESTOPPEL TO DENY LIABILITY.**—Where the board of public works of the city and county of San Francisco, acting under the general power granted it to erect schoolhouses, hires an architect to prepare the necessary plans and specifications, such municipality, after it has received the benefit of his labor and expenditure of time and

MUNICIPAL CORPORATIONS (Continued).

money, may not be heard to say that he should not be compensated as agreed. (Id.)

6. **FREEHOLDERS' CHARTER—APPOINTMENT OF SUPERINTENDENT OF SCHOOLS—TERM OF OFFICE.**—Where a freeholders' charter provides under the title "Department of Education" that "in all matters not specifically provided for in this charter the board (of education) shall be governed by the provisions of the general law relative to such matters," and such charter is silent as to the term for which the superintendent of schools should be elected, its provisions only authorizing the board of education, at its discretion to "appoint a superintendent of schools, and prescribe the duties and fix the salary of such superintendent," it follows as a natural and necessary deduction that the electors in adopting such charter, and the legislature in ratifying it, intended that the duration or term of office of the superintendent of schools should be controlled by the general statute, which fixes the term at four years. (*West v. Board of Education*, 199.)
7. **BAKERSFIELD—RECALL OF OFFICERS—DUTY OF COUNCIL TO CALL ELECTION—WHEN MANDATORY.**—The duty imposed upon the city council of the city of Bakersfield to order and fix a day for the holding of a recall election upon being presented with a duly certified recall petition is mandatory only where a petition sufficient in form and substance is presented. If any requisite and material statement is omitted therefrom so as to make it appear that the petition is invalid, the council is justified in refusing to order and fix a day for the holding of such election. (*Sidler v. City Council of Bakersfield*, 349.)
8. **GROUND FOR REMOVAL—STATEMENT OF NOT NECESSARY.**—Under the charter of the city of Bakersfield it is not necessary that the affidavit required to be filed by an elector as a condition precedent to the issuance of the recall petition papers or that the recall petition contain a statement of the grounds upon which the removal is sought. (Id.)
See School Law, 1.

MUTUAL BENEFIT ASSOCIATIONS.

1. **CHANGE OF BENEFICIARY—COMPLIANCE WITH LAWS.**—Where the by-laws or constitution of a mutual benefit society provide a method for making a change of beneficiary, a member in making a change must follow substantially the method prescribed; and he may change his beneficiary and name a new beneficiary whenever and as often as he pleases, provided he follows the steps required by the society's rules on the subject. (*Barboza v. Conselho etc.*, 775.)
2. **EXCEPTIONS TO RULE.**—The rule that a member of a mutual benefit society must follow substantially the method prescribed in

MUTUAL BENEFIT ASSOCIATIONS (Continued).

the by-laws or constitution in order to make a change of beneficiary has three recognized exceptions, namely: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of an insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course laid down in the society's rules was not pursued; (2) If it is beyond the power of the insured to comply literally with the regulations, a competent court will treat the change as having been legally made; (3) If the insured has pursued the course pointed out by the laws of the association, and has thus done everything devolving upon him to change the beneficiary, but before the new certificate issues he dies, a court of equity will decree that to be done which ought to have been done, and act as though the certificate had been issued. (Id.)

3. **LOSS OF POLICY—NONCOMPLIANCE WITH LAWS.**—Where the laws of a mutual benefit society provide that a member may change beneficiaries "by making the change on the back of the policy or a duplicate thereof," and if the policy has been lost or destroyed, in order to obtain a duplicate he must make an affidavit for that purpose, and that before a duplicate policy can be issued the supreme directors "must give their permission and approval to the supreme secretary to issue a duplicate policy," and further provide that when the change of beneficiaries has been properly indorsed upon the back of the original policy the same must be filed with a designated body for approval or rejection, the filing of an affidavit showing the loss of the original policy and the making of an order that a duplicate issue does not constitute sufficient compliance with the laws of the society to entitle the desired changed beneficiary to recover the amount of the policy. (Id.)

NAMES.

1. **IDEM SONANS—REBUTTAL OF PRIMA FACIE CASE.**—Names which have the same pronunciation do *prima facie* designate the same persons, but the *prima facie* case so shown is liable to be much shaken by the slightest proof of facts which produce a doubt of identity. (Robben v. Benson, 204.)
2. **ADMISSIBILITY OF PAROL EVIDENCE.**—Where the case permits parol evidence, such testimony may show two names to be within the rule although there is considerable difference in spelling. (Id.)
3. **SIMILARITY OF SOUND—PROVINCE OF COURT AND JURY.**—If two names spelled differently, necessarily sound alike, the court may as a matter of law pronounce them to be *idem sonans*; but if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury. (Id.)

NAMES (Continued).

4. **ADDITION OF LETTER "S."**—Generally, the addition of a letter "s" to one of the two names considered takes them without the rule of *idem sonans*. (Id.)
5. **RELEVANCY OF FACTS IN REGARD TO TITLE.**—The facts in regard to the title of property as shown by the records would be quite as conclusive as an aid in determining the question of identity as would be the clearest kind of parol testimony introduced in those cases where the court is in doubt as to whether two names which are very similar, though somewhat differently spelled, have substantially the same pronunciation and designate the same person. (Id.)

See Deeds, 1; Title, 2

NEGLIGENCE.

1. **COLLISION OF AUTOMOBILE WITH PEDESTRIAN—FINDING—EVIDENCE.** In this action for damages for personal injuries received in a collision with an automobile, the defendant's negligence was clearly established, he having approached the crossing where the accident occurred driving on the wrong side of the street and at an excessive rate of speed, without sounding any warning, notwithstanding his view thereof was obscured. (Park v. Orbison, 74.)
2. **FAILURE TO LOOK BOTH DIRECTIONS.**—In such an action the plaintiff is not precluded from recovering because, having seen the lights of automobiles coming from both his left and his right before starting to cross the street, he did not keep a lookout for both approaching machines, but waited until he reached the center of the street before again looking to the right to observe the approach of cars from that direction. (Id.)
3. **USE OF PUBLIC STREETS—DUTIES OF PEDESTRIANS AND DRIVERS OF VEHICLES.**—While pedestrians walking across busy public streets are required to use ordinary care to see that they do not collide with or are run over by vehicles, drivers of vehicles likewise must use ordinary care to prevent injury to pedestrians under such circumstances. (Id.)
4. **OBJECTIONABLE ANSWER—REMEDY.**—Where the question asked by counsel for the plaintiff is proper but a portion of the answer given is hearsay, or otherwise objectionable, the remedy is for counsel for defendant to make a motion at that time to strike out the objectionable portion of the answer. Having failed to avail himself of such remedy, the defendant may not be heard on appeal to complain of the admission of such testimony. (Id.)
5. **AUTOMOBILE COLLISION—FINDINGS—EVIDENCE.**—In this action for damages for personal injuries suffered by plaintiff as the result of a collision between two automobiles, the findings of the trial court that the defendant was guilty of negligence in the operation of his

NEGLIGENCE (Continued).

car and that the claim of the defendant that the plaintiff's husband was guilty of contributory negligence could not be sustained, were abundantly supported by the evidence. (*Blackburn v. Marple*, 141.)

6. **APPROACH OF INTERSECTING WAY—OBSTRUCTION OF VIEW—REDUCTION OF SPEED—QUESTION OF FACT.**—The question as to the distance away from an intersecting road with an obstructed view when a driver upon the highway going at an otherwise legal rate of speed should reduce his speed to ten miles an hour under the provisions of subdivision 6 of section 22 of the Motor Vehicle Act of 1913, is necessarily a question of fact in each individual case to be determined by the trial court according to such particular circumstances as the kind of car the operator was driving, the speed at which he was previously going, the brake control of the car, and the nature of the obstruction to his view of the intersecting road. (*Id.*)
7. **AUTOMOBILE COLLISION—ACTION FOR DAMAGES—EVIDENCE—FINDINGS—APPEAL.**—This action for damages alleged to have been suffered through the negligence of the defendant in the operations of his automobile whereby it was caused to collide with an automobile operated by the plaintiff, on the evidence, was peculiarly one which called for the judgment of the trial court upon the question as to the negligent act of the defendant, and the trial court having solved the question in favor of the plaintiff, the appellate court could not say from the transcript of the evidence, that the findings of the trial court were in any way unsupported by the evidence. (*Blackburn v. Marple*, 236.)
8. **APPROACH OF INTERSECTING WAY—OPERATION AND CONTROL OF MOTOR VEHICLE—CONSTRUCTION OF LAW.**—The intent of the Motor Vehicle Law, in requiring that the operator of a motor vehicle, upon approaching an intersecting way where the view is obstructed, must not travel at a greater rate of speed than ten miles an hour, is that it shall be brought to the speed indicated by the time it shall reach the intersecting way in order that it may be fully under control of the operator; and in this action it cannot be said that plaintiff violated the provisions of such statute, he having been traveling at the rate of about twenty miles per hour, his machine being under control, but having slowed down to about eight miles per hour at the time his machine was struck by the defendant's machine, he not having yet entered upon the intersecting way. (*Id.*)
9. **LAST CLEAR CHANCE.**—Under the facts of this case there was nothing which would make the doctrine of the last clear chance applicable to either party. (*Id.*)
10. **OWNERSHIP OF PREMISES—DUTY TO REPAIR.**—While an owner is primarily responsible for the repair of all portions of his premises,

NEGLIGENCE (Continued).

he is not an insurer with reference to the condition thereof generally, but must have notice of defects before he can be held liable in damages for failure to repair. (*Calvert v. G. G. Burnett Estate Co. Inc.*, 456.)

11. **DEFECTIVE CONDITION OF LEASED PREMISES—INJURY TO THIRD PERSONS—WHEN OWNER RESPONSIBLE.**—Ordinarily, the owner of a building which is in the possession of a tenant is not liable to third persons for injuries resulting from a defective condition of any portion of the premises unless the building was defectively constructed or he had notice of such defective condition. (*Id.*)
12. **DUTY OF OWNER TO REPAIR SIDEWALK—CONSTRUCTION OF SAN FRANCISCO CHARTER.**—The provision of section 16 of chapter 2 of article VI of the charter of the city and county of San Francisco that "until the sidewalk or roadway of any improved street in the city and county of San Francisco is finally accepted . . . the obligation to repair, reconstruct or improve the same is imposed upon the owner or owners of the lots fronting thereon," does not make the owner of property an insurer of the safety of persons using the sidewalk in front thereof, nor a guarantor that the sidewalk contains no openings. (*Id.*)
13. **VIOLATION OF STATUTE—WHEN ACTIONABLE NEGLIGENCE.**—The violation of a statute or municipal ordinance is actionable negligence only as to a person for whose benefit or protection it was enacted, and where the plaintiff does not belong to the class that the law was designed to protect, the violation thereof will not avail to supply the element of duty owing. (*Figone v. Guisti*, 606.)
14. **VIOLATION OF SECTION 273F, PENAL CODE—EMPLOYMENT OF MINOR SON IN SALOON—KILLING OF PATRON—LIABILITY OF FATHER.**—A father who violates the provisions of section 273f of the Penal Code by sending his son under the age of eighteen years into a saloon conducted by him to assist in the work there, violates a duty owing to his son, but not to third parties, and, therefore, such violation will not furnish a basis for a recovery in an action against such father by the parents of another boy who is killed by the minor son while thus employed. (*Id.*)
15. **RESPONSIBILITY OF MASTER FOR TORTS OF SERVANT—ACCESS TO DANGEROUS INSTRUMENTALITY.**—A master is responsible for the torts of his servant only when they are committed within the scope of the employment, and not when they arise out of a private quarrel having nothing to do with the master's business. The fact that the injury involved the use of a dangerous instrumentality, and that it was by reason of his employment that the servant was enabled to get possession thereof, does not alter the rule. (*Id.*)

NEGLIGENCE (Continued).

16. **TORT OF MINOR SON—LIABILITY OF FATHER.**—A father is not liable for the tort of his minor son because he negligently placed him within reach of a loaded revolver which the son used to the injury of another. (Id.)
17. **ACTION FOR DAMAGES—AUTOMOBILE COLLISION—LIABILITY OF OWNER—CONTROL OF TRUCK BY THIRD PARTY.**—In this action by a father for damages for the death of his son, who was killed in a collision between a truck on which he was riding and a gasoline motor car operated on a railroad track, the court properly granted a nonsuit as to the owner of such truck, both the truck and the chauffeur at the time of the collision having been under the exclusive control and management of another to whom the truck had been hired. (*Burns v. Southern Pacific Co.*, 667.)
18. **EXCLUSIVE CONTROL BY CHAUFFEUR—LIABILITY OF FELLOW-EMPLOYEE.**—Where such chauffeur had exclusive control and management of the truck at the time of the collision and was acting upon his own initiative with full power to manage the same as to him might seem wise or expedient as the driver of a gasoline engine, the court properly granted a nonsuit as to a fellow-employee who was only accompanying the truck as a passenger, neither exercising control nor giving any direction as to its movements. (Id.)
19. **EMPLOYER ENGAGED IN FARMING AND FRUIT-RAISING—WORKMEN'S COMPENSATION ACT OF 1913 NOT APPLICABLE.**—A cause of action against an employer engaged in farming and fruit-raising for the death of an employee through the negligence of a fellow-employee is specially exempted from the Workmen's Compensation Act of 1913 and the subsequent amendments thereto. (Id.)
20. **ROSEBERRY ACT NOT REPEALED.**—The provisions of the Roseberry Act, so far as they relate to compensation for injuries occurring to persons engaged in farm, dairy, agricultural, viticultural or horticultural labor, were not repealed by the Workmen's Compensation Act of 1913. (Id.)
21. **ACTION FOR DAMAGES FOR BURNING OF WAREHOUSE—ORIGIN OF FIRE—PREPONDERANCE OF EVIDENCE—ERRONEOUS INSTRUCTION.**—In an action for damages for the burning of a warehouse and its contents by reason of the alleged negligent act of defendant's janitor in placing and leaving a can of hot ashes and coals against the rear end of the building, it is prejudicial error to instruct the jury that "if a preponderance of the evidence fails to satisfy you that the fire was so caused, or leaves in your mind any doubt, confusion, or uncertainty as to the origin of the fire, your verdict should be for the defendant." (*Greenleaf v. Pacific Tel. & Tel. Co.*, 691.)

NEGLIGENCE (Continued).

22. EVIDENCE—CUSTOM OF JANITOR—REBUTTAL.—Where in such action the janitor had testified that he knew that he had poured water on the ashes taken up on the evening preceding the fire, and gave as a reason for his certainty that he had wet them down on this particular night, that he did it every night—in other words, that it was his invariable custom, the court committed error in excluding evidence offered to rebut the janitor's statement that it was his invariable custom to pour water on them before depositing them in the container. (*Id.*)

23. CONTRADICTION OF OWN WITNESS—FOUNDATION NECESSARY.—While, in order to discredit his own witness by showing that he had on other occasions made inconsistent statements, it is necessary that the party calling him show that he has been taken by surprise, it is not necessary that the element of surprise be shown as a condition of contradicting the witness by independent evidence as to the facts. (*Id.*)

24. COLLISION BETWEEN AUTOMOBILE AND HORSE—VERDICT—EVIDENCE. In this action for damages for personal injuries alleged to have been sustained by plaintiff as the result of a collision between a horse then being ridden by the plaintiff and an automobile operated by one of the defendants, the verdict was supported by testimony appearing in the reporter's transcript which warranted the jury in arriving at the conclusion that the accident was caused by the negligence of the defendant automobile driver, and that no actions of the plaintiff in the premises constituted negligence contributing proximately thereto. (*Eddy v. Stowe*, 789.)

25. LAW GOVERNING CASE—DUTY OF AUTOMOBILE DRIVER.—Such an action is not governed entirely by the provisions of the Motor Vehicle Act (Stats. 1915, p. 397). While both the plaintiff and the defendant had an equal right to the use of the road, if defendant was in the better position to avoid the collision, it was his duty to take all necessary steps to do so. (*Id.*)

26. KNOWLEDGE OF FRIGHT OF HORSE—DUTY OF AUTOMOBILE DRIVER.—Where defendant had knowledge that plaintiff's horse was frightened, it was his duty to keep a lookout ahead, and as he approached the horse and rider, to note the movements of the horse, and when he saw, or by the exercise of reasonable caution could have seen, that the horse was under excitement, bucking and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve plaintiff of his perilous position. (*Id.*)

27. APPROACH OF FRIGHTENED HORSE—RIGHT OF DRIVER TO PROCEED—DISCRETION—CONSTRUCTION OF MOTOR VEHICLE ACT.—The provision of the Motor Vehicle Act requiring the person driving a motor vehicle on the highway, approaching a horse on which a

NEGLIGENCE (Continued).

person is riding, and the horse appearing frightened, to reduce the speed of the car, and, if requested by signal or otherwise, by the rider of such horse, to proceed no farther toward such animal "unless such movement be necessary to avoid accident or injury," until such animal is under the control of its rider, does not vest the driver of the motor vehicle with discretion to determine whether such movement is necessary. (Id.)

28. **STANDARD OF CARE—QUESTION FOR JURY.**—In such cases no fixed standard of care can be laid down as a matter of law, nor can it be said what conduct will amount to negligence; but, when the facts authorize the submission of the case to a jury, it should be left to them to determine from all the facts and circumstances whether or not the driver of the automobile exercised or failed to exercise ordinary care to avoid the accident, and whether or not the injured party observed due care. The legal measure of duty is the same upon both of the parties. Each must act with reasonable care to avoid an accident or collision. (Id.)

29. **COMPLIANCE WITH MOTOR VEHICLE ACT NOT SUFFICIENT.**—In this action for damages for personal injuries alleged to have been sustained by plaintiff as the result of a collision between a horse then being ridden by the plaintiff and an automobile operated by one of the defendants, the fact that such defendant may have been proceeding along the highway in full compliance with the provisions of the Motor Vehicle Act did not relieve him of all obligations in the premises; but the jury were justified in finding that he was guilty of negligence in proceeding as he did, and that such negligence was the proximate cause of plaintiff's injuries. (Id.)

30. **POSITION OF PLAINTIFF ON LEFT SIDE OF ROAD—NOT NEGLIGENCE PER SE.**—The fact that plaintiff was on the left side of the road did not constitute a violation of the statute governing the use of the highway amounting to negligence *per se* where his position in the highway was governed by the actions of his frightened horse, which he was unable to control. (Id.)

See *Waters and Water Rights*, 9; *Workmen's Compensation Act*, 7-10, 12.

NEGOTIABLE INSTRUMENTS. See *Promissory Notes*, 7, 8, 11, 12.

NEW TRIAL.

1. **ORDER IN GENERAL TERMS GRANTING—EFFECT OF.**—The effect of an order in general terms granting a new trial, generally speaking, is to open up the entire case as to all the parties, regardless of the fact that some of them may not have moved for a new trial. (*Murphy v. Bridge*, 87.)

NEW TRIAL (Continued).

2. **ORDER DENYING MOTION—APPEAL—DISMISSAL.**—An order denying a motion for a new trial not being appealable, an attempted appeal therefrom should be dismissed. (*Whitcomb v. Giannini*, 229.)
3. **NOTICE OF INTENTION—SIGNATURE BY ATTORNEY NOT OF RECORD—WAIVER OF OBJECTION.**—Where the attorneys for the plaintiffs are served with copies of a notice of intention to move for a new trial, and an acknowledgment of receipt thereof is given on the original, without seasonable objection, they cannot later be heard to deny the validity of such notice because it is not signed by the attorney of record, but by another attorney who has been requested by the attorney of record and the defendants to become an attorney of record, but who, through inadvertence in signing the notice, signed his own name alone. (*Leake v. City of Venice*, 568.)
4. **FAILURE TO SIGN NOTICE OF INTENTION—DEFECT NOT JURISDICTIONAL.**—While the law requires that notices of intention to move for a new trial be signed, failure to observe this requirement does not establish a defect of jurisdiction. (*Id.*)

See Appeal, 7, 10, 21.

NONSUIT.

WHEN JUSTIFIED.—A court is justified in granting defendant's motion for a nonsuit after the evidence on both sides has been heard in a case, where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by the evidence. (*Figone v. Guisti*, 606.)

See Negligence, 17, 18.

NOTICE. See Contracts, 14, 24, 25; Corporations, 2, 16, 19; Judgments, 4, 5; Liability Insurance, 1; Mechanics' Liens, 13-15, 17; New Trial, 3; Parties, 1, 3, 4.

NUISANCES. See Jurisdiction, 3; Red-light Abatement Act, 1.

OFFER. See Corporations, 32.

OPINION. See Attorney and Client, 1.

OPTION. See Contracts, 45.

ORDINANCES. See Negligence, 13.

PARENT AND CHILD. See Alienation of Affections, 9, 10, 17; Negligence, 14, 16; Trusts, 1.

1. AMENDMENT OF PLEADINGS—SUBSTITUTION OF PARTIES—NOTICE—

The substitution of one party for another by order of court is not such an amendment of a pleading as is required to be made on notice or to be engrossed otherwise than to be entered in the minutes of the court. (*Nezik v. Cole*, 130.)

2. SUBSTITUTION OF DEFENDANTS—SUBSTANTIAL COMPLIANCE WITH

CODE REQUIREMENTS.—In this action for damages for personal injuries, the notice of motion served on counsel who had represented the corporation defendant prior to the termination of its existence as a legal entity and the order of the court directing that the proposed amended and supplemental complaint be filed and made of record in the case, and further directing that the defendants named in said amended and supplemental complaint, who had been the directors of the corporation prior to and at the time it ceased to exist, have and were given twenty days from date of a service of a copy of such order in which to plead thereto, constituted a substantial compliance with section 385 of the Code of Civil Procedure, and operated to bring about a substitution of said directors as defendants in lieu of the defunct corporation. (*Id.*)

3. SUBSTITUTION OF PARTIES—NOTICE.—One substituted in a cause

must be duly notified of the fact of his being made a party before he can be affected by notice or proceedings in the action. (*Id.*)

4. WANT OF NOTICE OF APPEARANCE—JUDGMENT INVALID.—Where,

after the bringing of the action and the service of process, but prior to appearance, the corporation defendant ceased to exist as a legal entity, and the persons who were the directors of the corporation prior to and at the time it ceased to exist as a legal entity were substituted as defendants in lieu thereof, but there was no service upon or authorized appearance by or in behalf of such substituted defendants, the default entered in the action against them was unauthorized, and the judgment entered thereon void. (*Id.*)

5. ACTION AGAINST FORMER ADMINISTRATOR.—Under appropriate cir-

cumstances, an administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain a suit for an accounting against a former administrator; and in such an action, the administrator is the only necessary party plaintiff. (*Barber v. Superior Court*, 221.)

See *Contracts*, 13; *Corporations*, 7, 9; *Estates of Deceased Persons*, 7; *Joint Adventures*, 3; *Judgments*, 6; *Jurisdiction*, 4; *Negligence*, 13; *Pleading*, 4; *Receivers*, 5.

PARTITION.

WAIVER OF RIGHT BY CONTRACT—BREACH OF CONTRACT BY JOINT TENANT—REVIVAL OF RIGHT.—While the right to partition conferred by section 753 of the Code of Civil Procedure may be waived by agreement, a joint tenant who enters into such an agreement, in consideration of a covenant and agreement on the part of the other joint tenant to farm the land and to keep an accurate and intelligible account accessible to the former of all receipts and expenditures, is released from any legal or moral obligation to carry out his promise or covenant upon the failure of the other joint tenant to keep his agreement. (*Asels v. Asels*, 574.)

PARTNERSHIP.

AGREEMENT FOR DISSOLUTION—BINDING EFFECT OF.—In a suit to decree the dissolution of a partnership, in the absence of its inherent invalidity or facts which might enable one of the contracting parties to rescind it, the court cannot disregard the agreement for dissolution, but by its decree must enforce it; and in such a suit none of the partners can have the benefit of the agreement for dissolution and evade those of its provisions by which their respective rights in the partnership assets are determined. (*Nannizzi v. Caprile*, 498.)

See Appeal, 14, 18; Corporations, 32; Joint Adventures, 1-5; Judgments, 4.

PAYMENT. See Estates of Deceased Persons, 5; Liability Insurance, 6.

PERFORMANCE. See Mechanics' Liens, 1, 4, 6.

PERMITS. See Corporations, 31.

PERSONAL INJURIES. See Negligence, 24; Workmen's Compensation Act, 4-7, 10, 11.

PETITIONS. See Estates of Deceased Persons, 7; Municipal Corporations, 8.

PLEADING.

1. **ACTION ON NOTE AND CONTRACT—ADMISSION OF EXECUTION AND DEFAULT—FAILURE TO RAISE MATERIAL ISSUE.**—Where, in an action on a promissory note and contract which called for the payment by the defendant to the plaintiffs of a stated sum, as the purchase price of certain shares of the capital stock, the answer of the defendant admitted all the allegations of the complaint with respect to the purchase of said stock and the execution of the note and contract, but denied for want of information and belief an

averment in the complaint to the effect that the trustee mentioned in the contract had assigned and transferred to the plaintiffs the note in question after the maker's default according to the terms and requirements of said contract, which assignment and transfer it was the duty of the said trustee *pro forma* to make upon the plaintiff's demand after such default, according to the express agreement of the defendant in said contract, the default of the defendant not being denied, no material issue was presented. (Findley v. Lindsay, 158.)

2. **REFUSAL OF LEAVE TO FILE AMENDED ANSWER—DISCRETION OF TRIAL COURT.**—In such action the trial court committed no error or abuse of discretion in refusing defendant leave to file an amended answer at the time of trial, which was four months after his original answer was filed, where the affidavit offered in support of such motion presented no sufficient reason as an excuse for the defendant's delay in presenting his amended answer, and the proposed amended answer presented no sufficient averments of fraud in respect to the transaction in the course of which said note was executed by the defendant to constitute a defense thereto. (Id.)
3. **ACTION TO RECOVER BAIL MONEY—PERMISSION TO WITHDRAW ANSWER AND FILE ANOTHER—DISCRETION OF COURT—PROTECTION FROM DEFAULT.**—In an action against a justice of the peace to recover bail money deposited by the plaintiff to secure the appearance of a third party at a preliminary hearing upon a criminal charge, which money after the discharge of such third party but prior to its return to the plaintiff was levied upon by the sheriff under a writ of execution issued upon a judgment in an action against such third party, after answer by the defendant and denial of plaintiff's motion for judgment on the pleadings, the court acted within its discretion in granting the defendant leave to withdraw his answer and file another answer within five days, and the answer on file protected the defendant from default to a time when the order granting five days within which to file another answer became operative and in effect. (Israel v. Superior Court, 711.)
4. **JUDGMENTS—SUBSTITUTION OF DEFENDANTS—RELEASE OF ORIGINAL DEFENDANT—HOW ORDERS REVIEWABLE—MANDAMUS—CERTIORARI.** Where prior to the expiration of the time within which the defendant was given leave to file another answer, upon affidavits being filed and motion made under section 386 of the Code of Civil Procedure, the judgment creditor and the sheriff were substituted as defendants and their answer filed, the money deposited in court, and the original defendant released from further liability, and thereafter the action was tried and judgment rendered that plaintiffs take nothing and that defendants recover their costs, the orders

PLEADING (Continued).

of the court substituting the new defendants and releasing the original defendant, though made in excess of jurisdiction, are not subject to review in a proceeding in *mandamus* to compel the court to render a judgment against the original defendant. The court's action should have been annulled in a proceeding in *certiorari*, wherein the original status of both parties would have been restored and their rights protected. (Id.)

5. SALE OF SAWMILL AND TIMBER—FAILURE TO PAY—SUFFICIENCY OF COMPLAINT.—In this action arising out of an agreement for the sale and purchase of a sawmill and certain logs and timber, for which the vendee agreed to pay within a reasonable time, the possession of which it was alleged the defendant was wrongfully and unlawfully withholding from the plaintiff, the defendant having been let into possession but not having paid any part of the purchase price, although over six months had elapsed and he had used over one hundred and fifty thousand feet of logs and timber in running the sawmill and applied the sums realized from the lumber produced for his own uses and purposes, the complaint, though somewhat inartificially drawn, stated a cause of action, and the general demurrer was properly overruled. (*Cambridge v. Ramser*, 722.)

6. LACHES—DEMURRER.—It is only when laches affirmatively appears on the face of the complaint that this defense can be raised by demurrer. (*Varrois v. Gomet*, 756.)

See Alienation of Affections, 1; Bankruptcy, 7; Contracts, 16, 23, 41; Corporations, 20; Criminal Law, 16, 21, 22; Depositions, 1, 2; Findings, 4; Fraud, 1, 3-5; Joint Ventures, 4; Landlord and Tenant, 11; Liability Insurance, 4; Parties, 1, 2; Prohibition, 1; Slander, 1; Specific Performance, 1-4; Street Law, 2-9; Tax Sales, 2; Trade Names, 6; Vendor and Vendee, 2, 3.

PLEDGES. See Corporations, 1, 3; Liens, 5.

POSSESSION. See Attachment, 3; Chattel Mortgages, 2; Forceful Entry and Detainer, 3; Landlord and Tenant, 8-10; Liens, 5.

POWER OF SALE. See Contracts, 49.

PRESCRIPTION. See Waters and Water Rights, 6, 7.

PRESUMPTIONS. See Alienation of Affections, 8, 10-12, 17; Appeal, 12, 13, 15, 17, 19, 24; Corporations, 17; Estates of Deceased Persons, 1; Fraud, 1; Mechanics' Liens, 6; Promissory Notes, 2; Red-light Abatement Act, 4; Specific Performance, 3; Trusts, 1.

PROHIBITION.

1. **PLEADING—SUFFICIENCY OF COMPLAINT.**—The question of the sufficiency of a complaint to state a cause of action cannot be tested on an application for a writ of prohibition. Its sufficiency as a pleading is to be determined by the court in which it is filed. (Yolo Water etc. Co. v. Superior Court, 332.)
2. **PURPOSE OF WRIT—JURISDICTION.**—The writ of prohibition goes only to the jurisdiction of the court. (Drew v. Superior Court, 651.)
3. **FAILURE TO SEEK RELIEF IN LOWER COURT.**—Where there has been no effort made to obtain relief in the court which it is sought to prohibit, the higher courts will refuse to exercise their jurisdiction by the extraordinary remedy of prohibition. (Id.)
4. **EXCESS OF JURISDICTION—FAILURE TO CALL ATTENTION OF LOWER COURT.**—Prohibition will not go from the appellate court unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction. (Id.)
5. **ERRORS DURING PROGRESS OF CAUSE—PROHIBITION NOT REMEDY.**—The court in which relief is sought by prohibition will not consider any error or irregularities occurring in the progress of the cause in the inferior court. The writ of prohibition is not an appropriate remedy for the correction of errors. (Id.)
See Jurisdiction, 1; Receivers, 1, 4.

PROMISSORY NOTES.

1. **CONSIDERATION—EXTINGUISHMENT OF PRIOR RIGHTS.**—The extinguishment of a promissory note executed by the husband prior to his marriage, the consideration for which passed solely to him, constitutes a sufficient consideration for the promise of the wife to pay a new note executed by both of them. (Simpson v. Smith, 194.)
2. **NEGOTIABLE INSTRUMENTS—CONSIDERATION PRESUMED FROM WRITING—KNOWLEDGE OF INFIRMITY—WHEN INNOCENT PURCHASER PROTECTED.**—A written instrument is itself presumptive evidence of a consideration, and where there is not in the possession of the purchaser of a promissory note knowledge of any infirmity in the paper on the score of consideration, or of facts, which, when followed with reasonable diligence, would lead to the discovery of such infirmity, and no fraud in the transaction resulting in the execution of the note is shown or claimed, the purchaser, if he has exchanged value for the note, will be protected as an inno-

PROMISSORY NOTES (Continued).

sent purchaser for a consideration, and so may enforce payment thereof. (*Commercial S. Co. v. Modesto Drug Co.*, 162.)

3. **CORPORATIONS—SEAL NOT AFFIXED—WANT OF AUTHORITY—EVIDENCE.**—The fact that the seal of the corporation was not affixed to the notes is neither conclusive evidence of a want of authority for the execution thereof for the corporation, nor a circumstance sufficient to create even a suspicion that the notes were wanting in a consideration, or that their consideration had failed at the time of their transfer to the plaintiff. (*Id.*)
4. **NEGOTIABLE INSTRUMENTS—TRANSFER BY BILL OF SALE—NOTICE OF INFIRMITY.**—The fact that the plaintiff took a bill of sale of the notes with a guaranty from the payee that they would be paid, in lieu of the customary indorsement in such a case, does not constitute a circumstance sufficiently significant to justify a suspicion that the notes were not all that they on their face purported to be. Such may have been the uniform custom and policy of the plaintiff. (*Id.*)
5. **WHEN BURDEN OF PROOF ON PURCHASER.**—It is only where fraud or illegality in the inception of a promissory note is shown that the burden is upon the purchaser of such an obligation to prove that he purchased the note before maturity, in good faith, for value, in the usual course of business. (*Id.*)
6. **BANKS AND BANKING—DELIVERY OF NOTE FOR COLLECTION—NOTICE OF OWNERSHIP—PAYMENT TO NOMINAL PAYEE—LIABILITY.**—Where such bank at all times had actual notice of plaintiff's possession and claim of ownership of the note and that he was depositing it for collection on his own account and for his own benefit, although it was not indorsed by the payee named therein, it acted at its peril in accounting for the collections to such nominal payee, without notice to plaintiff. Such failure of the bank to account to plaintiff for the collections made could only be justified by a showing that plaintiff was not entitled to the money. (*Bell v. German American Trust etc. Co.*, 402.)
7. **PROVISION FOR ATTORNEY'S FEES—NEGOTIABILITY OF INSTRUMENT.**—A provision in a promissory note that "should an attorney be employed to enforce the payment of this note, we agree to pay an additional sum of one per cent on principal and accrued interest as attorney's fees," does not render the note non-negotiable. (*Fox v. Crane*, 559.)
8. **PROVISION FOR INCREASED INTEREST AFTER MATURITY—NEGOTIABILITY OF INSTRUMENT.**—A provision in a promissory note payable one year after date that the interest thereon is to be "payable annually, and if not so paid to be compounded and bear the same rate of interest as the principal; and should the interest not be paid when due then the whole sum of the principal and in-

PROMISSORY NOTES (Continued).

terest shall become immediately due and payable at the option of the holder," does not render the note non-negotiable. (Id.)

9. **RECEIPT OF NOTE IN PAYMENT OF PROPERTY—ACQUISITION IN ORDINARY COURSE OF BUSINESS.**—Promissory notes received before maturity, without notice or knowledge of any claim of the makers that they have a defense thereto, in part payment for certain real property, are acquired in the ordinary course of business and for a valuable consideration. (Id.)
10. **"USUAL COURSE OF BUSINESS"—MEANING OF TERM.**—As applied to commercial paper, the term "in the usual course of business" means the delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it when offered for the purpose for which it was transferred. (Id.)
11. **NEGOTIABILITY—INDORSEMENT WITHOUT RECOURSE.**—The indorsement of a promissory note without recourse by the original payee does not destroy its negotiability. (*Ambrose v. Hammond Lumber Co.*, 597.)
12. **GARANTEE OF PAYMENT BY INDORSEE.**—The guarantee of the payment of a promissory note by the indorsee does not affect its negotiability. (Id.)
13. **SALE OF NOTE—GIVING OF LUMBER CREDIT IN PAYMENT—TRANSFER OF CREDIT TO THIRD PARTY—LIABILITY ON CREDIT.**—Where a lumber company, in consideration for a certain promissory note purchased by it in good faith and in due course of business before maturity, gives its indorser a credit on its books for the agreed purchase price of the note, the same to be paid in lumber, and thereafter such credit is transferred to a third person in settlement on an indebtedness to the latter, the lumber company is liable to such third person on the credit. (Id.)
14. **EXCHANGE OF NOTES—SUFFICIENCY OF CONSIDERATION.**—The delivery by a company to an individual of certain promissory notes executed by it constitutes sufficient consideration for the execution and delivery by such individual to the company of his promissory note for the aggregate amount thereof. (Id.)
15. **CONSIDERATION—EVIDENCE.**—In this action to recover on a promissory note which the plaintiff claimed was indorsed and delivered to him prior to maturity, in due course of trade and for a valuable consideration, the evidence was sufficient to sustain the finding of the trial court that there was no consideration for the execution of the note. (*Shepard v. Hunt*, 630.)
16. **INTENT OF PARTIES—CONTEMPORANEOUS CONTRACT.**—Where a promissory note is given as part payment for a contract, found to be without value, not only is it necessary for the court to look

PROMISSORY NOTES (Continued).

to the provisions of the contract other than the provision containing the recital as to the consideration therefor in order to ascertain the true intent of the parties as expressed in the terms of their contract, but it is proper to look beyond the instrument itself in order to determine the real consideration for the payment made by the defendant, even though a consideration different than that stated in the written agreement might be discovered. (Id.)

17. **PURCHASE IN GOOD FAITH—EVIDENCE—JURISDICTION OF APPELLATE COURT.**—In this action to recover on a promissory note which the plaintiff claimed was indorsed and delivered to him prior to maturity, in due course of trade and for a valuable consideration, the findings of the trial court to the effect that the plaintiff did not purchase the note sued upon in good faith and in the ordinary course of business find ample support in the evidence. It is not for the appellate court to determine where the preponderance of the proof is; it need look no further into the record than to discover evidence of a substantial nature which, to a rational mind, may be deemed to support the findings in the behalf stated. (Id.)
18. **CREDIBILITY OF WITNESSES—PROVINCE OF TRIAL COURT—CONSIDERATION OF INDIRECT EVIDENCE.**—In such action the trial court was the exclusive judge of the credibility of the witnesses at the trial of the action, and while the plaintiff disclaimed any knowledge impeaching the integrity of the note in suit at the time it was indorsed and delivered to him, and his testimony was corroborated by the indorser of the note, the court was not bound, under the circumstances shown by the evidence, to accept as true the testimony of the plaintiff merely because it was direct and was not directly contradicted, but was duty-bound to consider both the direct and indirect evidence bearing upon the nature of the transfer and what was in the plaintiff's mind at the time. (Id.)
19. **PRIMA FACIE CASE—BURDEN OF PROOF.**—After the plaintiff in such action had established a *prima facie* case, the burden was cast upon the defendant to show that the note in suit was not founded upon a sufficient consideration. Such proof having been adduced by the defendant, the burden of showing that he was an innocent holder passed to the plaintiff. (Id.)
20. **INNOCENT HOLDER—EVIDENCE.**—The indorsee of a promissory note may show that he is an innocent holder by proof that he purchased the note before maturity for value and in the usual course of business, unless the evidence shows that the note was taken under circumstances creating the presumption that he knew or should have known the facts impeaching its validity. (Id.)

See Corporations, 14; Evidence, 9; Pleading, 1.

PUBLIC LANDS.

1. **RE-ESTABLISHMENT OF GOVERNMENT CORNERS—USE OF PROPORTIONAL METHOD—NOT CONTROLLING ON STATE COURTS.**—The proportional method in re-establishing government corners as laid down by the surveyor-general of the United States is for the guidance of the United States deputy surveyors in running lines in which the government is interested, and cannot control a state court in its choice of means for establishing the point where the government surveyor originally placed a section or quarter-section corner, when that question properly arises within its jurisdiction. (*McKenzie v. Nichelini*, 104.)

2. **CASE AT BAR—LOCATION OF CORNERS WITHOUT USE OF PROPORTIONAL METHOD.**—In this action involving the location of the dividing line between the north and south halves of a certain quarter-section of land, the trial court was justified in locating the quarter-section corners in question as it did without resort to the proportional method. (*Id.*)

See *School Lands*, 1-9, 11.

PUBLIC OFFICERS. See *Municipal Corporations*, 7, 8.

PUBLIC POLICY. See *Mortgages*, 5.

PUBLIC UTILITIES. See *Jurisdiction*, 3.

PUBLIC WORKS. See *Bonds*, 2.

QUANTUM MERUIT. See *Mechanics' Liens*, 3.

QUIETING TITLE.

1. **APPEAL—LAW OF CASE—SUFFICIENCY OF ABSTRACT OF TITLE—SUBSEQUENT TRIAL—ADMISSION OF NEW FACTS.**—In an action involving the sufficiency of the record title to certain property as shown by the abstract furnished, the opinion of the district court of appeal, declaring the necessity for the bringing of an action to quiet title in the vendor as against the grantee named in a certain deed as recorded to establish of record that the conveyance was made to such vendor's predecessor instead of the grantee named, will not prevent such vendor on a subsequent trial from showing by evidence, which was not before the district court of appeal, that the deed in question was not important. (*Robben v. Benson*, 204.)

2. **INTERVENTION BY LIEN CLAIMANT.**—In an action to quiet title, a person claiming a judgment lien on the property may be permitted to intervene. (*Id.*)

See *Deeds*, 1; *Tax Sales*, 2.

RAILROAD COMMISSION. See Jurisdiction, 4.

RAPE. See Criminal Law, 39.

RATIFICATION. See Corporations, 14.

RECALL. See Municipal Corporations, 7.

RECEIVERS.

1. ACTION IN UNLAWFUL DETAINER—RIGHTS OF PARTIES—PROHIBITION.

In a proceeding in prohibition brought for the purpose of determining the right of the superior court to appoint a receiver in an action in unlawful detainer, the appellate court cannot decide the controversy between the parties as to the ownership of the fruit grown on the land in question. (*Takeba v. Superior Court*, 469.)

2. APPOINTMENT OF IN UNLAWFUL DETAINER ACTIONS—CODE AMENDMENT NOT RETROACTIVE.

The 1919 amendment to section 564 of the Code of Civil Procedure, authorizing the appointment of a receiver in an action in unlawful detainer in which the superior court has exclusive original jurisdiction, deals with the substantive rights of the parties as well as in the matter of a remedy and, therefore, is not applicable to actions instituted prior to the date it went into effect. (*Id.*)

3. LITIGATION AS TO TITLE TO PROPERTY—DANGER OF LOSS—POWER TO APPOINT RECEIVER.

Where the dispute in litigation is as to the title of the property involved therein and it is made satisfactorily to appear that the property is of such a character or is in such a situation that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties. (*Id.*)

4. SUFFICIENCY OF APPLICATION FOR APPOINTMENT—REVIEW ON PROHIBITION.

Where the order appointing a receiver in a given case is within the jurisdiction of the court, whether the facts disclosed to the court on the application for the appointment are such as legally to warrant it in putting in operation or applying its jurisdiction in that regard cannot be inquired into or reviewed on an application for a writ of prohibition. (*Id.*)

5. PERSONS INTERESTED NOT MADE PARTIES—JURISDICTION OF COURT NOT AFFECTED.

The power of the court to appoint a receiver in a given case is not affected by the fact that certain persons who claim an interest in the property of which the receiver is to

RECEIVERS (Continued).

take possession are not made parties to the action and, therefore, are without opportunity to protest in court against the appointment of the receiver. (Id.)

RECITALS. See Attachment, 2.

RED-LIGHT ABATEMENT ACT.

1. **CHARACTER OF HOUSE—EVIDENCE—GENERAL REPUTATION.**—In an action brought under the "Red-light Abatement Act" for the purpose of abating a nuisance existing in a given house, evidence of the general reputation of the place may be of itself sufficient to prove the character of the house. (People v. Macy, 479.)
2. **BAD MORAL CHARACTER OF INMATES.**—In such a prosecution, evidence that the character of several inmates or frequenters of the place was morally bad is a circumstance of great importance in the determination of the character of the house. (Id.)
3. **RESORT TO ARTIFICE AND STRATEGY BY INVESTIGATORS—ADMISSIBILITY OF TESTIMONY.**—In such a prosecution, the fact that the investigators resorted to artifice and strategy and placed themselves in an attitude of willingness to participate in the commission of an immoral and illegal act in order to obtain evidence of the character of the house in question would not render their testimony inadmissible. (Id.)
4. **USE OF PLACE UNTIL GIVEN DATE—PRESUMPTION OF CONTINUANCE—REBUTTAL.**—In such a prosecution, from proof that the house in question was used for immoral purposes as late as a given date, and that there was a course of such conduct up to that time, the presumption would follow that the condition continued to exist as long as is usual for things or condition of such nature, this presumption being overcome only by satisfactory evidence that the condition had changed. (Id.)

REIMBURSEMENT. See Tax Sales, 1-3.

RELEASE. See Guaranty, 3; Mortgages, 4, 5; Partition, 1.

REMEDIES. See Contracts, 33; Judgments, 5; Jurisdiction, 1; School Lands, 10; Workmen's Compensation Act, 5.

REPRESENTATIONS. See Vendor and Vendee, 6, 7.

RESCISSION.

1. **EXCHANGE OF PROPERTIES—FRAUDULENT REPRESENTATIONS—DEFICIT IN RENT—FAILURE TO MAKE TENDER.**—Rescission of a contract of exchange of an apartment house business for certain real property, on the ground of fraudulent representations, will not be denied

RESCISSION (Continued).

because the plaintiffs failed to tender the amount they were in arrears in the rent of the apartment house, which had accrued since the inception of their tenancy and was unpaid through no fault on their part, but solely by reason of the insufficiency of the income from the apartments to produce the necessary funds for the payment of the monthly rental, where the defendant not only failed to make any objection to the form or the particulars of the tender, but absolutely refused to acquiesce in rescinding the transaction, and he knew at the time of the exchange of the properties the apartment house not only would not realize any profit to the plaintiffs, but, on the contrary, would be in their hands, as it had been in his, a losing venture. (*Spencer v. Deems*, 601.)

2. **RESCISSION FOR FRAUD—INABILITY TO PLACE DEFENDANT IN STATU QUO—EQUITY.**—While it is true that a court of equity will not, as a general rule, decree a rescission of an executed contract unless the party desirous of effecting such rescission is able to place the defendant *in statu quo*, this rule is not without exception. Where such decree is sought upon the ground of fraud, and, because of peculiar complications or circumstances, it would be manifestly unjust and inequitable or impossible to apply such a rule, the court in the exercise of its broad powers as a court of equity, and not having any special solicitude for the party enmeshed in the web he has spun for others, may decree rescission, notwithstanding such party may not be placed exactly *in statu quo*. (*Id.*)
3. **RESCISSION OF CONTRACT—ASSIGNMENT OF LEASE—CONSENT OF OWNER—FINDING.**—A contention that the plaintiffs could not rescind the contract of exchange of properties without the consent of the owner of the apartment house, which consent is not shown in the findings, is without merit, where there is no showing that the lease contained a covenant against assignment and, as found by the trial court, the plaintiffs did tender and offer to the defendant the lease in question, together with an assignment thereof. (*Id.*)
4. **SINGLE MATERIAL MISSTATEMENT—WHEN GROUND FOR RESCISSION.** A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it has been accompanied by a multitude of other false representations. (*Id.*)

See Contracts, 10, 17-19, 33, 40; Leases, 5, 11, 12.

RES JUDICATA.

DOCTRINE NOT APPLICABLE TO MOTIONS.—The doctrine of *res adjudicata* does not apply to motions, the matter of their renewal being in the discretion of the trial court. (*Johnson v. Ne'sor*, 113.)

See Execution, 1; Judgments, 1.

RIGHT OF WAY. See Contracts, 48.

RIPARIAN RIGHTS. See Waters and Water Rights, 1-5.

ROBBERY. See Criminal Law, 13, 25, 28.

SAFETY. See Workmen's Compensation Act, 10.

SALARY. See School Laws, 2.

SALES.

1. **DELIVERY F. O. B. BOAT—ACTION FOR BREACH OF CONTRACT—EVIDENCE OF CUSTOM AND USAGE.**—Where the contract for the sale and purchase of certain potatoes provides that said product is to be delivered f. o. b. boat, at a designated landing, but is silent concerning who is to provide the boat, in an action for breach of contract on the part of the purchaser, evidence of custom and usage is admissible to determine upon whom the burden is imposed of providing a boat upon which the produce can be loaded and to prove that f. o. b. means on the wharf ready for the boat. (*Yoshizumi v. Platt Produce Co.*, 673.)

2. **ORDERS BY THIRD PARTIES TO BARGE CAPTAIN—HEARSAY.**—In such action, orders given by a third party to the captain of a certain barge which had called at the landing on which plaintiff had delivered the potatoes were not competent to prove either what he said or did at the landing. (*Id.*)

See Appeal, 3; Bonds, 2; Contracts, 45; Corporations, 18; Judgments, 4; Liens, 4, 5; Pleading, 5; Promissory Notes, 2; Vendor and Vendee, 1, 6.

SAN FRANCISCO CHARTER. See Negligence, 12.

SCHOOL LANDS.

1. **GRANT TO STATE BY CONGRESS—LOCATIONS AND PATENTS—ACT OF 1852 NOT REPEALED.**—The act of 1857 (Stats. 1857, p. 356), authorizing the location and patenting of school lands, did not repeal the act of 1852 (Stats. 1852, p. 41), which provided for the disposal of the five hundred thousand acres of land granted by Congress to the state of California, either expressly or necessarily from the general language thereof. To the contrary, the act of 1857 made certain portions of the act of 1852 a part of its own provisions, or, if it strictly cannot be said that this is true, it certainly and unquestionably recognized by express language the validity of the warrants issued under the prior act, the

SCHOOL LANDS (Continued).

sale of such warrants and the rights acquired by purchasers of the same. (*Rosenberg v. Bump*, 376.)

2. **PURPOSE OF ACT OF 1857.**—The legislature by the act of 1857 merely intended to regulate the matter of locating warrants issued by the state and acquired by purchasers under the act of 1852, so that such locations would conform to the requirements of the United States statutes relative thereto. (*Id.*)
3. **RESERVATION CLAUSE IN ACT OF 1858—RIGHTS OF PURCHASERS UNDER EARLIER ACT.**—While the act of 1858 (Stats. 1858, p. 248) did expressly repeal, among others, the statute of 1852, it contained the express provision that "all school-land warrants, now in circulation, shall be received for school lands, and may be located as now provided by law." The meaning of this language is that school-land warrants in circulation at the time of the passage of the act of 1858 may be located as provided by the law existing at the time of the passage of said act, or as provided by the law authorizing the issuing and sale of such warrants. (*Id.*)
4. **CONSTRUCTION OF ACT OF 1868—RIGHT TO LOCATE WARRANTS.**—The legislature did not intend by the act of 1868 (Stats. 1867-68, p. 507), providing a new and different procedure for obtaining patents to the unlocated portions of the five hundred thousand acres of land set apart as school land, to vest solely and exclusively in the surveyor-general the right to make school-land warrant selections. The sale of the warrant constituted a sale by the state of the number of acres of land specified in the warrant, a sale of the land so specified for all time and unconditionally, and there was nothing remaining for the purchaser to do but to locate the number of acres his warrant called for. Having bought and paid for the land, there was no reason why his warrant should be presented to the surveyor-general as in payment for something he had already paid for. (*Id.*)
5. **RIGHT OF SURVEYOR-GENERAL TO LOCATE LANDS.**—The act of 1868 expressly limits the right of the surveyor-general to locate lands comprised within the grant by Congress to the unsold portions thereof, and it was not the intent of the legislature by such act to deprive owners of pre-existing land warrants of the right themselves to locate said warrants as agents of the state. (*Id.*)
6. **OWNERSHIP OF OUTSTANDING WARRANTS—ADDITIONAL PERMISSIVE RIGHT UNDER ACT OF 1868.**—The provision of the act of 1868 that outstanding warrants shall be taken in payment of any part of the grant was intended only to be permissive—that is to say, that it was intended to confer upon owners of outstanding warrants the right, in addition to their pre-existing right to locate the warrants as agents of the state, to present the same as pay-

SCHOOL LANDS (Continued).

- ment on applications to purchase lands embraced within the congressional grant. (Id.)
7. **EFFECT OF SAVING CLAUSE OF ACT OF 1868.**—By the saving clause of the act of 1868, the legislature intended to preserve to the purchasers of warrants issued and sold under the act of 1852 all the rights acquired by them by virtue of such warrants. (Id.)
 8. **VESTED RIGHT OF PURCHASER.**—The purchasers of school-land warrants issued and sold under the statutes of 1852 and 1853 acquired under such purchase a vested right to the amount of land specified in the warrants. (Id.)
 9. **SALE OF WARRANTS—CONTRACT WITH STATE—NATURE OF.**—The sale of school-land warrants by the state constituted a contract between the state and the purchasers of the warrants, although at the time of the sale the lands granted by Congress had not been listed to the state. The terms of the warrant were that the purchaser was entitled to locate the same in behalf of the state of California. The warrant constituted a contract of sale of the amount of land specified therein and which land was embraced within the grant to the state by Congress of five hundred thousand acres of land. (Id.)
 10. **RIGHT TO LOCATE WARRANTS—POWER OF LEGISLATURE TO AMEND PROCEDURE.**—While the legislature may amend the procedure or change the remedy whereby rights are judicially asserted, and such amendment or change may have a retroactive effect, except in those cases where the procedure or the remedy as amended or changed directly affects and impairs the right, the legislature is without the power to take away the right of the purchasers of school-land warrants to locate such warrants. (Id.)
 11. **DELAY IN LOCATING WARRANTS.**—As there was no time limit fixed by the statute of 1852 within which the locations were to be made, no rights could accrue to the state by reason of the delay in locating the warrants, it having been fully paid for the amount of land specified therein. (Id.)

SCHOOL LAW.

1. **EMPLOYMENT AND DISCHARGE OF TEACHERS—CONFLICT BETWEEN STATE AND MUNICIPAL LAW.**—The government of schools and the employment and discharge of teachers are not municipal affairs, and, by virtue of the provisions of article XI, section 8, of the constitution, whenever a conflict arises between the provisions of the state law and the provisions of a city charter, the state law controls. (*Vallejo High School District v. White*, 359.)
2. **NOTICE OF TERMINATION OF SERVICES—RIGHT OF APPEAL TO COUNTY SUPERINTENDENT OF SCHOOLS.**—Where a high school dis-

SCHOOL LAW (Continued).

trict after the first but before the tenth day of June of a given year, in writing, notifies the principal of the high school that his services will not be required after June 30th, such principal is not re-employed for the fiscal year beginning July 1st, following, and thereafter he is not a teacher in the employ of the high school district, and the county superintendent of schools has no authority or power to entertain his appeal for reinstatement or to reinstate him in his office as principal of the high school in that district. (Id.)

3. **EMPLOYMENT OF HIGH SCHOOL PRINCIPAL—MANDAMUS TO COMPEL PAYMENT OF SALARY.**—In this proceeding in *mandamus* to compel a county superintendent of schools to approve a requisition for the salary of the petitioner as principal of a given high school and to order the same paid to petitioner, the employment of petitioner's predecessor as principal of said high school having terminated on June 30th of the year in question, the board had authority to employ someone to take his place, and, before July 1st of that year, the petitioner having been regularly employed as such principal and having entered upon and performed the duties thereof, was legally entitled to the relief asked. (*Brown v. White*, 363.)

See Municipal Corporations, 6.

SEALS. See Corporations, 15; Promissory Notes, 3.

SECURITY. See Leases, 1.

SERVICES.

1. **ACTION IN QUANTUM MERUIT—PERSONAL SERVICES—USE OF AUTOMOBILE—WANT OF LEGAL CLAIM.**—In this action to recover a given sum as the reasonable value of work and labor and compensation for the use of plaintiff's automobile in the service of the defendant, which sum the complaint alleged was the balance due upon an open and current account between the plaintiff and the defendant, although the claim of plaintiff for back pay was one that might well have been addressed to the generosity of the defendant, plaintiff failed to show any legal claim upon the defendant either for salary or for the use of his automobile. (*O'Brien v. L. E. White Lumber Co.*, 703.)
2. **USE OF AUTOMOBILE IN DEFENDANT'S BUSINESS—FURNISHING OF SUPPLIES BY DEFENDANT—COMPENSATION.**—Where the use of plaintiff's automobile in the defendant's business was made by plaintiff without any intention of making any charge therefor, other than the value of the gasoline, oil, and tires used in its operation which he drew from the defendant, and was therefore gratul-

SERVICES (Continued).

tously given, except to the extent it might be compensated by the value of such supplies, such use cannot form a legal basis for a demand for compensation therefor. (Id.)

SIDEWALKS. See Negligence, 12.

SIGNATURES. See New Trial, 3, 4.

SLANDER.

1. **CHARGE OF FORGERY—ACTION FOR DAMAGES—PLEADING.**—The charge of forgery necessarily includes all the elements of the crime; therefore, in an action for damages for slander, it is sufficient to allege in the complaint that the defendant accused the plaintiff of having forged the former's name as the indorser of a certain check, without alleging that the slanderous words were used with the intention of charging that the plaintiff had forged the indorsement intending thereby to defraud. (*Carl v. McDougal*, 279.)
2. **DEFINITION OF FORGERY—PROPER INSTRUCTION.**—In such action the court did not commit error in defining to the jury the offense of forgery, it having previously properly instructed them that they must determine whether or not the defendant charged the plaintiff with the crime of forging his name to a check. If such a charge was made, it was slanderous. (Id.)
3. **SUFFICIENCY OF PROOF.**—In such action, the charge of slander is sufficiently proved by testimony that the defendant, in speaking of the plaintiff, said to one person that "He forged a check on me," and to another that "He had a check which he forged his name to it." Slander is established if enough of the words alleged as constitute the sting of the charge and contain the poison to the character are substantially proved. (Id.)

SPECIFIC PERFORMANCE.

1. **PLEADING AND PROOF—REQUISITES FOR RELIEF.**—In an action for the specific performance of a contract, the plaintiff must plead and prove that the party against whom that remedy is invoked received an adequate consideration for the contract and that, as to him, the contract is just and reasonable. (*Ehrhart v. Mahony*, 448.)
2. **SUFFICIENCY OF COMPLAINT.**—In an action by the vendors for the specific performance of a written contract for the purchase by defendants of certain mining property, allegations that the price at which the defendants agreed to purchase the property in question "is fair and reasonable and a fair valuation thereof, and that said contract is, as to the defendants, just, reasonable, fair, and

SPECIFIC PERFORMANCE (Continued).

equitable and was fairly entered into between the plaintiffs and defendants," while they in a measure involve conclusions of the pleader and of law, they also involve a statement of the fact and are sufficient to resist the effect of a general demurrer. (Id.)

3. **ISSUES PRESENTED—EVIDENCE—APPEAL—PRESUMPTION.**—Where the answer of the defendants specifically denied these allegations and thus tendered an issue upon the question of the fairness and reasonableness of the consideration, but the appeal is not supported by a transcript of the testimony or a bill of exceptions, the appellate court may presume, in support of the judgment in favor of the plaintiffs, that the action was tried upon the theory that the allegations were sufficient and that testimony was received without objection in support thereof. (Id.)

4. **TENDER OF CONVEYANCE—WHEN EXCUSED.**—In such an action, technical defects in the tender, or even a want of any tender, is immaterial, when the answer shows that a conveyance would have been refused in any event. (Id.)

See Contracts, 1, 2, 4, 16.

STATUTE OF FRAUDS. See Contracts, 20, 23.

STATUTE OF LIMITATIONS. See Trusts, 2-4.

STATUTES. See Negligence, 13, 14.

STATUTORY CONSTRUCTION.

1. **TAKING OF PROPERTY BY STATE—PRESERVATION OF CONSTITUTIONAL RIGHTS.**—So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of the statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. (Mathews v. Savings Union B. & T. Co., 45.)
2. **GENERAL RULE.**—Not only must a statute be construed, if possible, to avoid unconstitutionality, but the construction must be consistent with sound sense and wise policy, and with a view to promoting justice. (Id.)

See Banks and Banking, 1; Contracts, 17.

STOCK AND STOCKHOLDERS. See Corporations, 31.

STREET LAW.

1. **ACTION TO FORECLOSE LIEN—ADMISSION OF ASSESSMENT, DIAGRAM, AND WARRANT—SUFFICIENCY OF FOUNDATION.**—In an action to establish and foreclose the lien of a street assessment, the production of a witness who testified that he was one of the employees of the city clerk of the city in which said street improvement had been done, and who in that capacity produced and fully identified the records containing the assessment, warrant, and diagram of the street superintendent of the city, and further testified that these were to his knowledge part of the official records of said street superintendent's office, and that they were kept in the city clerk's office, was sufficient to furnish the requisite foundation for the introduction in evidence of such records. (*Rogers Brothers Co. v. Beck*, 110.)
2. **ALLEGATION OF CORPORATE EXISTENCE—INSUFFICIENT DENIAL—PROOF UNNECESSARY.**—In such action, the plaintiffs having alleged that they were corporations duly organized and existing under and by virtue of the laws of the state of California, the denial of such allegation based on the want of information and belief upon the subject was insufficient and amounted to an admission of the alleged fact; hence no evidence was required to prove such averment. (*Id.*)
3. **REFUSAL OF LEAVE TO AMEND ANSWER—DISCRETION NOT ABUSED.**—In such action, it was not an abuse of discretion to refuse the defendants leave to file an amended answer during the progress of the trial of the case, and more than ten months after the filing of their answer, where no sufficient reason was given for the delay. (*Id.*)
4. **APPEAL—INSUFFICIENT RECORD.**—Where leave to file an amended answer during the progress of the trial of a case is refused, but the record on appeal does not contain a copy of the proposed amended answer, the appellate court has no means of knowing its contents, and hence cannot determine whether or not the trial court should in any event have permitted it to be filed, nor whether its refusal to do so was error. (*Id.*)
5. **UNFAIRNESS AND FRAUD IN DOING WORK—PLEADING—EVIDENCE.**—Where, in an action to establish and foreclose the lien of a street assessment, the only unfairness or fraud alleged in the answer of the defendants related solely to the progress of the work and had reference to matters which were properly the subject of correction by appeal to the city council, whose decision, in the absence of fraud on the part of said council or its members in the hearing of said appeal or the rendition of such decisions, is final and conclusive upon the parties entitled to take said appeal, the court did not commit error in sustaining the plaintiff's objection to questions or proof offered by the defendants in an endeavor to show

STREET LAW (Continued).

fraud in the doing of the public work upon which the assessment in question was predicated. (Id.)

6. ACTION TO FORECLOSE LIEN—PLEADING—EVIDENCE.—Judgment affirmed on the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110. (*Rogers Brothers Co. v. Beck*, 799.)
7. ACTION TO FORECLOSE LIEN—PLEADING—EVIDENCE.—Judgment affirmed on the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110. (Id.)
8. ACTION TO FORECLOSE LIEN—PLEADING—EVIDENCE.—Judgment affirmed on the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515]. (Id.)
9. ACTION TO FORECLOSE LIEN—PLEADING—EVIDENCE.—Judgment affirmed on the authority of *Rogers Brothers Co. et al. v. Beck et al.*, ante, p. 110, [184 Pac. 515]. (Id.)

STREETS. See Negligence, 3.

SUBSCRIPTIONS. See Corporations, 31.

SUBSTITUTION. See Parties, 1, 3; Pleading, 4.

SURETIES. See Bonds, 1, 2; Contracts, 34; Mortgages, 2.

TAXATION.

LEASE OF LANDS FROM CITY—CONSTRUCTION OF IMPROVEMENTS—OWNERSHIP—EXEMPTION FROM TAXATION.—Improvements constructed in accordance with the terms of a lease with a municipal corporation upon lands granted by the state to such municipality in trust for certain purposes under the provisions of an act of the legislature approved May 1, 1911 (Stats. 1911, p. 1258), are not subject to taxation where it is expressly provided in the lease that such improvements when so constructed shall become and remain the property of the municipality. (*Oakland v. Albers Bros. Milling Co.*, 191.)

TAX SALES.

1. CONSTRUCTION OF SECTION 3898, POLITICAL CODE—WHEN PROVISIONS APPLICABLE.—The provision of section 3898 of the Political Code providing for the reimbursement of the purchaser at a tax sale whenever it shall be determined in an action at law that such sale and the conveyance are void merely affects the remedy of such purchaser and is intended to apply to all cases after its passage in which the invalidity of a tax title is judicially determined, notwithstanding the sale may have been held prior to the enactment of such law. (*Smith v. Golden State Syndicate*, 346.)

TAX SALES (Continued).

2. **VOID TAX SALE—RIGHT OF PURCHASER TO REIMBURSEMENT—**
CODE PROVISION POSITIVE—FORM OF PLEADING IMMATERIAL.—In view of the positive provision of section 3898 of the Political Code that no decree shall be made until the purchaser of the tax title shall have been refunded the amount paid for taxes, such relief must be granted to such purchaser in an action by the owner to quiet title to the property, notwithstanding such purchaser, in his complaint in intervention, does not pray for a refund of the amount paid for taxes but, relying on his tax title, alleges that he is the owner in fee simple of the property. (Id.)
3. **VOID DEED—REIMBURSEMENT OF PURCHASER.**—Judgment affirmed on the authority of *Smith v. Golden State Syndicate et al.*, ante, p. 846. (*Laux v. Los Angeles Stove Co.*, 801.)

TENDER. See Contracts, 33; Rescission, 1, 3; Specific Performance, 4; Unlawful Detainer, 1.

TIME. See Appeal, 22; Contracts, 11, 24, 47; Estates of Deceased Persons, 3; Mechanics' Liens, 4, 5, 12; Workmen's Compensation Act, 1, 3.

TITLE.

1. **EFFECT OF INSTRUMENT OF RECORD—ABSENCE OF ADVERSE CLAIMS.**
In judging whether a title is affected by an instrument of record purporting to show an interest outstanding in another it is permissible to show that no claim has ever been asserted by such other person. (*Robben v. Benson*, 204.)
2. **CASE AT BAR—SIMILARITY OF NAMES—SAME INDIVIDUAL—FINDING.**
In this action, although the two names, "B. W. Robbins," and "B. W. Robben," were not strictly within the rule of *idem sonans*, considering the great resemblance between them, the fact that they both appear in connection with the same title, and that during a period of thirty-eight years there had been no adverse claim to the property, the record would leave no reasonable doubt in regard to the title, and a finding that the two names represented different persons would not be sustained. (Id.)

See Contracts, 9, 10; Evidence, 9; Promissory Notes, 6; Receivers, 1.

TORTS. See Negligence, 15, 16.

TRADE NAMES.

1. **USE OF TO PROMOTE UNFAIR COMPETITION—INJUNCTION.**—A name or mark of such a nature that no one may acquire an exclusive right to its use; and which cannot become a trademark, may

TRADE NAMES (Continued).

become a trade name and the use of it to promote unfair competition may be prevented or redressed; and as against a particular defendant using the name upon a similar product, it is only necessary to show such facts as to put in operation the rules governing unfair competition. It is not necessary that the defendant should have duplicated the label used by the plaintiff before relief may be had. (Id.)

2. **USE OF WORDS "GERMAN TOAST" ON BREAD WRAPPERS—UNFAIR COMPETITION—INJUNCTION.**—In this action brought to enjoin the defendant from using the words "German Toast" upon wrappers used on bread manufactured by the defendant, the court should have found from the admitted facts and the exhibits in evidence that the plaintiff had acquired the right to the use of the term as a trade name for its bread as against the defendant, and that the defendant was guilty of unfair competition in the use of its said label upon its bread; and an injunction should have been granted restraining the defendant from using the said wrappers on the bread manufactured and sold by it. (Id.)
3. **VOLUNTARY ABANDONMENT OF USE OF NAME—RIGHT TO INJUNCTION.**—In such an action the plaintiff is entitled to an injunction notwithstanding the defendant has voluntarily abandoned the use of the label in question. (Id.)
4. **DUPLICATION OF — INJUNCTION — PLEADING—PROOF.**—Upon proper averments and proof of fraudulent intent and conduct on the part of a defendant in so duplicating the plaintiff's product or imitating the name or content of its wares, or the place or places of sale, as to deceive the public into the notion that it was in fact entering the plaintiff's store or buying the plaintiff's goods, a court of equity will enjoin the further pursuit of such fraudulent purposes and practices. (*Excelsior C. M. Co. v. Taylor Milling Co.*, 591.)
5. **SIMILARITY OF NAMES—UNFAIR TRADE DEALINGS BY COMPETITOR—ESSENTIALS TO RELIEF.**—Where the plaintiff has no exclusive right by way of trademark in the use of a particular name or term in the description of his business or product, he may not rely upon the mere similarity of names or terms employed by a competitor to establish fraud or justify an injunction, but in order to obtain such relief, the plaintiff in such case must aver and prove such a condition of unfair trade dealing on the part of the competitor in the way of duplication, imitation, advertising, and soliciting as would amount to a showing of willful fraud, imposition, and deceit. (Id.)
6. **USE OF WORD "FLAPJACK"—ACTION FOR INJUNCTION—INSUFFICIENCY OF COMPLAINT.**—In this action by a milling company whose product was put forth under the name of "California Flap-

TRADE NAMES (Continued).

jack Flour" to restrain the use by the defendant of the name "Flapjack" in connection with the product which the latter put forth under the names, "Los Angeles Best Self-rising Flap-jack Flour," and "Taylor's Improved Flapjack Flour," the complaint failed to state a cause of action, there being no showing of any attempt on the part of the defendant to deceive the public by a duplication of names, or that the defendant in placing its product upon the market under such distinctive names had done anything in the way of duplicating the wrappings or imitating the packages containing the plaintiff's wares, or of doing anything whatever in the way of advertising or soliciting which would have a tendency to deceive or mislead the purchasing public into the impression that they were buying the plaintiff's wares. (Id.)

TRANSFER. See Corporations, 2; Promissory Notes, 4, 5.

TRESPASS. See Leases, 7-9, 13.

TRUSTEES. See Bankruptcy, 7-9.

TRUSTS.

1. **RESULTANT TRUST—PAYMENT FOR REAL PROPERTY BY OTHER THAN GRANTEE—PARENT AND CHILD—PRESUMPTION OF ADVANCEMENT.**—The doctrine that a resultant trust arises when a transfer of real property is made to one person and the consideration therefor is paid by another does not arise where the parties concerned are husband and wife or parent and child. In such case the presumption is that the purchase and conveyance were intended to be an advancement for the nominal purchaser. (*Rossiter v. Schultz*, 716.)
2. **VOLUNTARY TRUSTS—REPUDIATION OF—STATUTE OF LIMITATIONS.**—In the case of a voluntary express trust where the estate is to be managed for the benefit of the trustor to be returned on demand, the statute of limitations does not begin to run until after a repudiation of the trust. The same rule is applicable to voluntary resulting trusts. (*Varrois v. Gomet*, 756.)
3. **INVOLUNTARY IMPLIED TRUSTS—REPUDIATION UNNECESSARY.**—In the case of an involuntary implied trust raised by operation of law no repudiation of the trust is necessary to start the running of the statute of limitations. (Id.)
4. **ACTION TO ENFORCE—NATURE OF TRUST ALLEGED.**—In this action for a judgment decreeing that certain real estate and personal property was the property of plaintiff and held by defendant in trust for plaintiff, for the transfer of such property to the plaintiff, and for an accounting, the pleader alleged facts showing an express voluntary trust arising out of the confidential

TRUSTS (Continued).

relations existing between the parties, the repudiation of which was necessary to start the running of the statute of limitations. (Id.)

5. **PROHIBITED TRUSTS—CONSTRUCTION OF SECTIONS 724 AND 857, CIVIL CODE.**—Such trust, in providing for accumulations after minority and permitting the conveyance of real property, was not void under sections 724 and 857 of the Civil Code. Section 724 of the Civil Code is a limitation upon the power to create future interests by will or transfer in writing, but has no application to the deposit of money with an adult to be invested for the use and benefit of the owner, while section 857 relates only to the creation of a trust for the benefit of a third person. (Id.)
6. **TRUST TO RECEIVE AND HOLD PROPERTY.**—A trust to receive and hold real property to be transferred to the trustor on demand is not a trust to convey within the meaning of *Estate of Fair*, 132 Cal. 523. (Id.)
7. **ACTION TO ENFORCE—LACHES.**—Where suit to enforce an express voluntary trust is commenced within less than two months after the rejection of demand upon the executrix of the estate of the deceased trustee and within three days after rejection of demand by the surviving trustee, this does not constitute such delay as would warrant the court in holding that the plaintiff was guilty of laches in the institution of the proceedings. (Id.)

See Corporations, 20; Judgments, 1.

UNDUE INFLUENCE. See Contracts, 39; Estates of Deceased Persons, 9, 10.

UNLAWFUL DETAINER.

JUDGMENT—RETENTION OF POSSESSION—TIME TO MAKE TENDER OF RENT DUE—APPEAL.—Under section 1174 of the Code of Civil Procedure, tender of the amount of rent found to be due should be made within five days after entry of judgment in an action in unlawful detainer, where retention of possession is desired; and the time for making such tender is not extended by the taking of an appeal from such judgment, notwithstanding the judgment is modified by striking therefrom the amount found to be due the plaintiff for taxes, which plaintiff sued for in a separate count, no order of reversal being made as to the remainder of the judgment. (*Chase v. Peters*, 226.)

VALUE. See Vendor and Vendee, 5.

VENDOR AND VENDEE.

1. **REPRESENTATIONS BY REAL ESTATE OPERATOR—MORTGAGEE NOT PARTY—NONLIABILITY.**—Where the original mortgagee was not

VENDOR AND VENDEE (Continued).

interested in the land purchased by the mortgagor and had no knowledge of the representations made by the real estate operator who conducted the transaction, and the latter was not its agent in the transaction, neither such mortgagee nor its assignee are chargeable with the fraud of such real estate operator. (Security Commercial etc. Bank v. Seitz, 353.)

2. **PLEADING—ACTION TO FORECLOSE MORTGAGE—AFFIRMATIVE RELIEF BASED ON FRAUD—ELECTION OF REMEDIES.**—In an action to foreclose a mortgage given as security for the payment of a promissory note executed by the defendants as part payment for the property, such defendants, in seeking affirmative relief by way of cross-complaint on account of alleged fraud in connection with the transaction, are required to elect which one of two remedies they intend to seek—damages after rescission or damages after affirmation. They cannot seek both. (Id.)
3. **DELAY IN DISCOVERING FRAUD—BURDEN OF PLEADING AND PROOF.** Where such relief was not sought within three years of the making of the alleged fraudulent representations, it was necessary to allege and prove, not only that the fraud was not discovered within the three-year period, but that it could not have been discovered within that time by the exercise of reasonable diligence. (Id.)
4. **EXCHANGE OF PROPERTIES—STATUS OF AGENT—EVIDENCE—FINDING.** In this action for damages resulting from an exchange of properties by the respective parties, brought about by the aid of false representations on the part of the agent who negotiated the transaction, the trial court was justified in holding that such agent was the agent both of the plaintiffs and the defendants. (Bonnarjee v. Pike, 502.)
5. **VALUE OF PROPERTY—EVIDENCE.**—A *bona fide* rent paid for the use of property or the price actually paid therefor at a *bona fide* sale may be proved as an aid in determining its value. (Id.)
6. **REPRESENTATION AS TO VALUE—STATEMENT OF FACT—WHEN ACTIONABLE.**—A representation as to the value of property is often a representation of fact, and actionable if false, especially where the vendee to whom the representation is made is so situated as to have no means of investigating the question for himself, and, therefore, relies on the statements of value made by the vendor or his agent. (Id.)
7. **REPRESENTATION BY AGENT—LIABILITY OF PRINCIPAL.**—When such a representation is made by an agent in the transaction of his principal's business, the latter, accepting the benefit of the transaction, is liable in damages for the agent's wrongful act. (Id.)

See Contracts, 45, 46; Pleading, 5.

VENUE. See Liability Insurance, 10.

VERDIOT. See Criminal Law, 37.

VERIFICATION. See Mechanics' Liens, 16.

WAIVER. See Contracts, 9, 11, 24; Criminal Law, 22; Evidence, 10; Landlord and Tenant, 5, 6; Liability Insurance, 1, 3, 4; New Trial, 3; Partition, 1.

WATERS AND WATER RIGHTS.

1. **RUNNING WATER—RIPARIAN RIGHTS.**—Riparian rights do not mean ownership in any special portion of the water of a stream until such water is actually taken and used. In running water there can be no absolute ownership. (Drake v. Tucker, 53.)
2. **DEED—RIPARIAN LAND—RESERVATION OF WATER—CONSTRUCTION OF.**—Under a deed reserving to the grantors the amount of water "held, used and claimed" by the former owner of the property, such grantors are entitled to only such amounts of water as were used by such former owner, the rights in the remainder of the water, in the absence of other priorities, being governed by the law applicable to riparian owners. (Id.)
3. **USE OF WATER BY RIPARIAN OWNERS—RIGHT TO IRRIGATE.**—A riparian owner may use the whole of the stream if it is necessary to satisfy his natural wants, and may consume all the water for his domestic purposes, including water for his stock, but if he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not furnish more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufacture. (Id.)
4. **WHEN RIPARIAN OWNER ENTITLED TO WATER—RIGHT TO DIVERT ON LAND OF UPPER OWNER.**—A riparian proprietor is entitled only to the water after it reaches his land in its natural flow, and if in the natural flow of the stream there is insufficient water conducted to defendant's land for his uses, he has not, as a riparian owner merely, the right to go on the land of an upper proprietor and divert the water from there. (Id.)
5. **DIVISION OF WATER IN PROPORTION TO ACREAGE—PROPER JUDGMENT.** As between the parties to the action, a judgment dividing the balance of the water, after the natural wants of the parties are satisfied, between them for irrigation purposes in the proportion that the acreage of each bears to the entire acreage of their riparian lands, is proper and reasonable. (Id.)

WATERS AND WATER RIGHTS (Continued).

6. **TITLE BY PRESCRIPTION—BURDEN OF PROOF—FINDINGS—EVIDENCE—APPEAL.**—The rule that the burden is upon the party who claims certain water rights by prescription to clearly prove by competent evidence all of the elements essential to such title is especially for the guidance of the trial court. If there is any substantial evidence in the record on appeal from which a rational inference may be drawn that the various elements of prescriptive right exist, the appellate court is bound by the findings of the trial court. (*Turner v. Bush*, 309.)
7. **CASE AT BAR—TITLE BY PRESCRIPTION—CONCLUSIONS OF TRIAL COURT—LEGAL JUSTIFICATION FOR.**—In this action brought to secure a permanent injunction to prevent the defendants from using or from interfering with the use by plaintiffs of one-third of the waters of a certain creek, there was legal justification for the conclusion that defendants and their predecessors in interest used all the water continuously, openly, and under a claim of right for at least five years and, therefore, acquired a title by prescription. (*Id.*)
8. **CULTIVATION OF LANDS—INJURY TO LOWER PROPRIETOR—DISCHARGE OF SURFACE WATERS—LIABILITY.**—One has a right to utilize the land which he owns, and if an increased flow of water, or of surface water, from his land to a lower piece of land comes from a proper use of his own land, from the cultivation of the same in a proper and useful manner, the lower land owner cannot complain of the increased flow caused by such use and ordinary cultivation or improvement of his land. (*Coombs v. Reynolds*, 656.)
9. **RIGHT TO INTENTIONALLY DAMAGE NEIGHBOR.**—While a man has a right to improve and cultivate his land, this does not give the right to intentionally damage his neighbor. (*Id.*)
10. **LIABILITY FOR NEGLIGENT CULTIVATION.**—Every owner of land has a right to cultivate it to make use of it for the purposes for which it is best adapted, and, in the course of such use, to plow and cultivate such land, and he is only responsible for injuries falling from such cultivation in the event that such cultivation is performed in a negligent manner. (*Id.*)
11. **RULE OF CIVIL LAW.**—While the civil law respecting surface or storm waters, to which the courts of this state are committed, protected a lower proprietor against an upper owner from injuries resulting from sending surface waters down to the lower owner in a manner different from their natural flow, there was one act of man excepted, and that was the tilling of the fields in the natural way. (*Id.*)

See *Contracts*, 27, 29, 30, 48.

WEALTH. See *Alienation of Affections*, 18.

WILLS. See *Estates of Deceased Persons*, 7-9.

WORKMEN'S COMPENSATION ACT.

1. **RETURN OF INJURED EMPLOYEE AT FULL PAY—EXTENSION OF TIME FOR FILING APPLICATION FOR RELIEF.**—In the absence of a showing as to the existence of an agreement or understanding as between himself and his employer to the effect that the full pay which he received after he returned to work following his injuries but prior to his discharge, or a portion thereof, was to be in the nature of compensation for his injuries, or that the work which he performed during that period was either unsatisfactory to his employer, or that the compensation which he received therefor was more than his services during that time were actually worth, it cannot be held that the mere fact that the employer permitted him to return to his old position at full pay and to continue therein for several months could give rise to a claim that a portion of the pay which he thus received was in the nature of compensation for his previous injuries, and that the time within which he might make application to the Industrial Accident Commission for relief was thereby extended. (*Hunt v. Industrial Acc. Com.*, 373.)
2. **MEDICAL ATTENTION AS COMPENSATION.**—The fact that the injured employee visited his employer's physician for the purpose of examination, no treatment or medicine being received, did not constitute the receiving or rendering of such service as could be construed to amount to compensation under the provisions of the Workmen's Compensation Act which would prolong the prescribed time for the filing of his claim. (*Id.*)
3. **UNAUTHORIZED STATEMENTS—DELAY IN PRESENTING CLAIM NOT EXCUSED.**—In the absence of some showing that the persons with whom he discussed the matter of his claim to compensation, and who assured him that his claim was being given proper attention, had authority from the employer to make such a statement, or that their positions were such in relation to the employer as to justify him in relying upon such assurances, proof of such statements was insufficient to support his claim that he was lulled into a sense of security by representations made on behalf of his employer to the effect that his claim was being given proper attention during the period that he had returned to his employment and before his discharge. (*Id.*)
4. **SCOPE OF EMPLOYMENT—EVIDENCE—FINDING.**—In this action for damages for personal injuries sustained while attempting to replace a belt on the pulley of a bran-packing machine, while the plaintiff's evidence as to the scope of his employment was too unsatisfactory, in view of the evidence of other witnesses to the effect that it was not unusual for a bran-packer to replace the belt when it slipped off, the jury was warranted in concluding that

plaintiff was acting within the scope of his duties when he undertook to put the belt back on to the pulley. (*Helme v. Great Western Milling Co.*, 416.)

5. **REMEDY OF INJURED EMPLOYEE—WHEN ACTION FOR DAMAGES MAINTAINABLE.**—The remedy of compensation afforded by the Workmen's Compensation, Insurance and Safety Act is exclusive of all other statutory or common-law remedies, except in the one case provided by subdivision "b" of section 12. By that subdivision it is provided that an injured employee, instead of presenting to the commission his claim for compensation as provided by the act, may, at his option, maintain in the courts an action at law against his employer to recover damages where all the three following elements coexist: (1) When the injury is caused by the employer's gross negligence or willful misconduct; (2) when the act or failure to act which is the cause of the injury is the personal act or failure to act on the part of the employer himself, or, if the employer be a corporation, on the part of an elective officer or officers thereof; and (3) when the act or failure to act which is the cause of the injury indicates a willful disregard of the life, limb, or bodily safety of the employees. (*Id.*)
6. **FAILURE OF EMPLOYER TO INCLOSE GEARS—ACTION FOR DAMAGES—ESSENTIALS TO RECOVERY—PLEADING AND PROOF.**—Where the failure to act, which is charged as the cause of the injury, was the failure to inclose certain gears in a housing, or otherwise to keep them from being exposed, to entitle the plaintiff in an action at law against the employer to recover he must allege, and, by a preponderance of the evidence, prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "willful misconduct"; (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of the defendant corporation as, for example, a director or directors; and (3) that such failure to house the gears indicates a willful disregard of the life, limb, and bodily safety of defendant's employees. (*Id.*)
7. **FAILURE TO COMPLY WITH COMMISSION'S ORDERS—GROSS NEGLIGENCE—WILLFUL MISCONDUCT.**—Unless, by failing to house such gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the Industrial Accident Commission, or with some safety requirement expressly defined and provided for by the act itself, it cannot successfully be claimed that defendant was guilty of either "gross negligence" or "willful misconduct." (*Id.*)
8. **GROSS NEGLIGENCE DEFINED.**—Gross negligence is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference t

WORKMEN'S COMPENSATION ACT (Continued).

the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequences, without the exertion of effort to avoid it. (Id.)

9. **WILLFUL MISCONDUCT DEFINED.**—Willful misconduct means something different from and more than negligence, however gross. The mere failure to perform a statutory duty is not, alone, willful misconduct. To constitute willful misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with conscious failure to act to the end of averting injury. (Id.)
10. **RECOMMENDATIONS OF ENGINEER NOT SAFETY ORDERS.**—Recommendations by a safety engineer representing the Industrial Accident Commission that certain changes be made in a given plant cannot be deemed the equivalent of an order made and entered by the commission itself and served on the employer, as contemplated by the Workmen's Compensation, Insurance and Safety Act. (Id.)
11. **USE OF SAFETY DEVICES—ABSENCE OF ORDERS—GENERAL REQUIREMENTS OF ACT.**—In the absence of any general or special order given and made by the commission in the mode and manner provided by the act, an employer's statutory duty, under the general requirements of the act itself, is to use such devices and safeguards as are "*reasonably adequate*" to render the place of employment safe, and to have its place of employment as free from danger to the life or safety of its employees "*as the nature of the employment will reasonably permit.*" (Id.)
12. **DEGREE OF CARE REQUIRED—ERBONEOUS INSTRUCTION.**—In an action for damages for personal injuries sustained while attempting to replace a belt on the pulley of a bran-packing machine, the plaintiff's arm having been caught in certain gears, an instruction that "if you find from a preponderance of the evidence in this case that the plaintiff at the time of the injury was acting in the course of his employment, then, if such gears constituted a source of danger to the life or safety of the plaintiff, the defendant owed to the plaintiff the duty of providing and maintaining over the gears in question such safety devices or appliances as would tend to mitigate or prevent the danger to plaintiff from contact thereof," exacts from the defendant a greater degree of care than is required by the Workmen's Compensation, Insurance and Safety Act. (Id.)
13. **EMPLOYMENT AS MAID IN SANITARIUM—RIGHT TO BENEFITS OF ACT.** Under the Workmen's Compensation Act a person employed at a sanitarium as a maid, her duties consisting of what is known as

WORKMEN'S COMPENSATION ACT (Continued).

general housework, in addition to which she attends upon patients in the sanitarium, is not engaged in a service falling within the exception of the Workmen's Compensation Act which excludes from the benefits of the act "any employee engaged in household domestic service." (*Gernhardt v. Industrial Acc. Com.*, 484.)

14. **INJURY WHILE PERFORMING OWN WORK—RIGHT TO COMPENSATION.**—Such an employee is not entitled to compensation for injuries received in slipping upon a wet floor on the premises of her employer, where at the time she was engaged only in the performance of work of her own, which was wholly disassociated from any duty having reference to her employment, she not being required to perform any service until one hour later. (*Id.*)
15. **OWNING AND RENTING OF HOUSES—NOT A "BUSINESS"—LIABILITY FOR INJURIES TO EMPLOYEE.**—The owning and renting of four small houses for residence purposes does not constitute a "business" within the meaning of the Workmen's Compensation Act, and the owner is not liable under the act for injuries received by a carpenter employed for about one hour to repair the roof of one of the houses. (*Lauzier v. Industrial Acc. Com.*, 725.)
16. **CONSTRUCTION OF AMENDMENT OF 1917.**—The amendment of 1917 to the Workmen's Compensation Act (*Stats.* 1917, p. 831), providing "The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade name, articles of incorporation or principal business of the employer to the contrary notwithstanding," did not work an extension of the ordinary definition to be applied to the terms "trade or business," but was designed to have a clarifying effect only upon the original terms of the enactment. (*Id.*)

See Negligence, 19.

WRIT OF REVIEW. See Certiorari.

WRITTEN INSTRUMENTS.

EVIDENCE—CONSTRUCTION OF WRITTEN INSTRUMENTS—ADMISSIBILITY OF PAROL TESTIMONY.—When written instruments are not ambiguous, they may not be varied by parol testimony; and even though, during the course of the trial, the court considers certain instruments ambiguous, it does not commit error in refusing to allow the introduction of evidence of the negotiations and understandings of the parties thereto at the time they were executed where, in arriving at its judgment, it does not treat the instruments as ambiguous, but construes them correctly without the aid of parol evidence. (*Drake v. Tucker*, 53.)



